

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7649

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United States Court of Appeals

For the Second Circuit

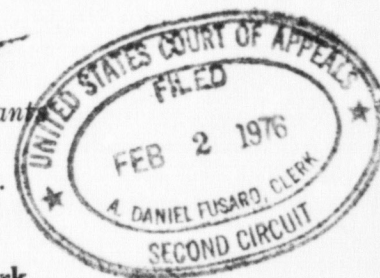
MARVIN STERN,

*Plaintiff-Appellee
and
Cross-Appellant,*

against

SATRA CORPORATION and
SATRA CONSULTANT CORPORATION,
*Defendants-Appellants
and
Cross-Appellees.*

Appeal from a Judgment of the United States
District Court for the Southern District of New York



JOINT APPENDIX

VOLUME III OF IV

Pages 739A to 1113A

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1
2 Q Did you ever ask Mr. Stafford if maybe there was
3 a way we could figure out to get out of this contract with
4 Dr. Stern? Did you ever ask that?

5 A I did not.

6 Q Do you know if Mr. Giffen had?

7 A I don't believe so.

8 Q Is there anything else that Mr. Stafford put
9 you straight about at this meeting?

10 A I remember -- I have told you or the Court what
11 I remember.

12 Q Incidentally, when Mr. Stafford became the
13 president of Satra Industrial Corporation, was his job to
14 service IBM?

15 A No.

16 Q Did he correspond and meet with officials of
17 IBM in connection with the Satra business with IBM?

18 A To a very minimal degree.

19 Q Are you sure of that?

20 A Pardon?

21 Q Are you sure of that?

22 A I'm sure of that, yes. Of course, to the best
23 of my knowledge.

24 Q Oh, yes.

25 A He had friends there. What he did with his
friends --

1
2 MR. HELLERSTEIN: Could you mark this FFFF for
3 identification.

4 (Plaintiff's Exhibit FFFF was marked for
5 identification.)

6 Q I show you this exhibit --

7 MR. HILL: Mr. Hellerstein, could you wait just
8 a second to see if we have ever seen a copy of that?

9 (Pause.)

10 Q I show you Exhibit FFFF for identification. I
11 ask you if that's a copy of Mr. Stafford's signature, if you
12 can recognize it?

13 A I would not -- I could not tell you that it is
14 Mr. Stafford's, but it is our stationery and it does
15 indicate that it was signed by Mr. Stafford.

16 Q As president of Satra Industrial Corporation?

17 A As president of Satra Industrial Corporation.

18 Q Is he writing to IBM in connection with possible
19 sales by IBM to Russia?

20 A Yes, he does.

21 Q Is that part of the relationship that Satra had
22 with IBM in connection with its contract with IBM?

23 A Well, I believe Dr. Stafford is talking of new
24 opportunity with the Soviet airlines and it certainly was
25 one of our functions to look for new opportunities.

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Q He was talking about a large contract that was possible between IBM and Aeroflot, wasn't he?

MR. HILL: Your Honor, I'm going to object to this. I think it has gone far enough.

THE COURT: Are you going to put it into evidence or not, Mr. Hellerstein?

MR. HELLERSTEIN: I am not really interested in what is said in the document so much --

MR. HILL: Could we have the document stricken? If it isn't being offered for anything, strike it.

THE COURT: What are you interested in?

MR. HELLERSTEIN: I'm interested in the role that Mr. Stafford played.

THE COURT: Do you want to ask if this refreshes the witness' recollection as to certain things Mr. Stafford did; you are allowed to do that.

MR. HELLERSTEIN: That's precisely what I am doing.

THE COURT: That isn't precisely what you are doing.

MR. HELLERSTEIN: Inartfully.

THE COURT: Well, do it artfully, so the jury understands.

Q Does that document refresh your recollection as

1
2 to the role Mr. Stafford played in connection with Satra's
3 connection with IBM?

4 A I have a fairly good memory of the role that
5 Dr. Stafford played.

6 Q Was his role to be a liaison between the business
7 affairs of Satra and the business affairs with IBM insofar
8 as it concerned possible sales to Russia?

9 A No. If you like I can elaborate on this,
10 because prior to Mr. Stafford joining us I did call
11 Mr. Jones to tell him --

12 THE COURT: That is the present of IBM World
13 Trade?

14 THE WITNESS: That's right, sir.

15 A (Continuing) To say that I understood
16 Mr. Stafford was now free and we were contemplating having
17 him join our organization. Then I asked him first of all
18 would he mind.

19 He had no objection, but he expressed a prefer-
20 ence. said, as I knew, because I had been told this
21 before, IBM was very sensitive in having their ex-employees
22 involve themselves in the relationship between the Soviet
23 Union and IBM and that he didn't care what Dr. Stafford did,
24 but he must not act in any capacity that would intervene
25 between a direct relationship -- in a direct relationship

1 5rqd

Oztemel-cross

2 between the Soviet Union and IBM.

3 Q You mean Mr. Jones told you that as far as he
4 was concerned he did not want Mr. Stafford to be involved
5 in the Satra account with IBM?

6 A No, that is not what I said.

7 Q Please --

8 A Mr. Jones was telling me what he told me before,
9 that IBM still insisted on a direct relationship between
10 themselves and any given customer, in this case the Soviet
11 Union. As Mr. Stafford, or any other person who was
12 familiar with IBM's products and their procedures, he
13 didn't want it in any way to be construed that they were
14 now intervening in this relationship.

15 THE COURT: Am I to understand, Mr. Oztemel,
16 that that didn't mean really much more as to Mr. Stafford
17 than it meant about anybody else; that is, that it meant
18 that IBM wanted to have a direct relationship with the USSR
19 and it didn't want anybody to represent them as an inter-
20 mediary?

21 THE WITNESS: That's right, your Honor, but
22 the concern was -- as we have another gentlemen who years
23 ago was an IBM employee -- the existence of an ex-IBM
24 employee or a computer expert immediately --

25 THE COURT: Creates an implication or could?

1
2 THE WITNESS: That's right, and Mr. Jones was
3 very sensitive of that.

4 THE COURT: And he wanted to set the record
5 straight?

6 THE WITNESS: That's right, sir.

7 Q Mr. Oztemel, let me see if I can refresh your
8 recollection this way.

9 MR. HILL: Just a minute, your Honor. The
10 witness hasn't testified that he is without a recollection.

11 THE COURT: No, I don't think he has,
12 Mr. Hellerstein. You can ask him if he gave certain answers
13 to certain questions, if you believe that what you are about
14 to read is inconsistent with what the witness has testified.

15 MR. HELLERSTEIN: Yes, I do, your Honor.

16 Q On page 715 of your transcript of your pretrial
17 deposition taken on August 23, 1972, do you recall having
18 been asked this question and having given this answer:

19 "Q Is Mr. Stafford to service the IBM account
20 for Satra?

21 "A Yes."

22 Do you recall giving that testimony?

23 A Yes.

24 Q Would you like to change your present testimony
25 in this respect?

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A No, I don't.

Q Let's move on to a different subject.

You testified, did you not, that you made an offer to Dr. Stern when he was terminated. I think you said something, and you correct me if I'm wrong, like \$100,000 or a five percent type of ratio.

Do you recall having testified substantially that way?

A We are talking of Dr. Stern now?

Q Yes.

A Yes.

Would you ask it to me again, please?

Q Do you recall having made him an offer when you terminated his position as a joint venturer or partner of yours?

A Yes.

Q When did you make this offer?

A As closely as I can remember, at the same time when we -- when I told Dr. Stern of what we had found out.

Q So it was in the same time as you terminated him?

A Well, terminated -- let's say when we had that discussion. I was not terminating anything.

Q You were telling him you considered your agreement -- the document we contend is an agreement, you were

1 8rqd Oztemel-cross 681
2 telling him that that was no longer effective as far as you
3 were concerned, did you not?

4 A I was telling him that that part of the agreement
5 which had to do with his invaluable services was not any
6 longer there and that I was proposing to compensate him for
7 the other part.

8 Q It was at that time you made this proposal to
9 him; is that correct?

10 A As nearly as I can remember.

11 Q Let me show you Exhibit D. Perhaps the jury at
12 the same time could be given copies of Exhibit D, the
13 proposal and acceptance.

14 Is this the document that you were no longer
15 considering as an effective document between you and
16 Dr. Stern?

17 THE COURT: Up to the point where he said he
18 didn't consider it effective?

19 MR. HELLERSTEIN: Yes, sir.

20 A I believe the one I am looking at is the offer
21 giving two alternatives. I believe there is an acceptance
22 and a following agreement.

23 Q Isn't the document on the top the acceptance?

24 A That's the acceptance.

25 Q So we have the offer and the acceptance, right?

1 9rqd

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2 A But I believe another document was drafted after
3 this.

4 THE COURT: I don't think the record indicates
5 that any other document was executed.

6 THE WITNESS: Perhaps not. I'm sorry, your
7 Honor. I withdraw that, yes.

8 Q Is this it?

9 A Yes.

10 Q All right.

11 Tell me, Mr. Oztemel, could you tell the jury
12 what part of this document, if we could call it that, did
13 Dr. Stern not perform?

14 A Yes, I think I can tell you.

15 On page 2, paragraph B.

16 Q Is there anything else there that he didn't
17 perform?

18 A Do you want me to point out where Dr. Stern was
19 to work for his money?

20 Q Yes, I would like you to tell the jury what part
21 of the document you complained to Dr. Stern that he didn't
22 perform.

23 A I was about to tell you, sir.

24 Q Please.

25 A Page 2, paragraph B says that Dr. Stern would

1 have continued to receive commissions as long as he devoted
2 such time as necessary to service the agreement.

3 Q Is there anything else in the agreement that he
4 didn't perform?

5 A In this agreement, no, sir.

6 Q That's the whole thing?

7 A It's a very short agreement.

8 Q I realize that. But that's the problem you had?

9 A That was not the problem we had because the
10 problem we had had to do with many conversations, many dis-
11 cussions and a meeting of the mind with Dr. Stern, very
12 little of which was reflected in a hardly put together
13 agreement.

14 Q Mr. Oztemel, I would like you, as best you can,
15 to be specific here because we are dealing --

16 A I will try, sir.

17 Q Tell me what aspects of this agreement are the
18 subject of your complaint with respect to Dr. Stern beyond
19 this particular point.

20 MR. HILL: I'm sorry --

21 MR. HELLERSTEIN: Beyond this particular point.

22 MR. HILL: I'm sorry. When you are in front of
23 me, Mr. Hellerstein, I just lose words.

24 A If you will allow me, I would have to clarify as
25

1 llrqd

Oztemel-cross

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2 to my understanding of your terminology, agreement. My
3 understanding --

4 Q Let's call it a document, all right?

5 A No, because the document was not the agreement.
6 The document was -- to me, it was a brief form of a much
7 larger concept that Dr. Stern and ourselves had developed.

8 Q What was this that you have in front of you?

9 A This is a brief document drafted very hurriedly
10 with the assistance of Dr. Stern and Satra, to be replaced
11 by the document which reflected all the things that he
12 understood and we understood.

13 Q You told the jury yesterday, if I recall, and
14 you correct me if I'm wrong, that this document was prepared
15 after having long discussions held that same day, arduous
16 discussions, I think you said in substance.

17 A I didn't say prepared. I said long discussions
18 and debates, etc., had led to this agreement.

19 Q It was clear to you at that point that Dr. Stern
20 didn't trust you very much, wasn't it, Mr. Oztemel?

21 A Strangely enough, that was the first time I had
22 heard, because Dr. Stern did not reflect any such hostile
23 attitude at the time.

24 Q I am not talking about hostility, I'm talking
25 about trust. Was it clear to you at the time --

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A Well, mistrust is rather hostile.

Q At this time. How about then?

A At any point, sir.

Q So you regarded Dr. Stern as not trusting you very much?

A No, quite the contrary.

Q Let me understand it so we have it clear. You thought Dr. Stern trusted you at the time?

A I didn't know whether he trusted me, but I knew that he certainly did not mistrust me.

Q You did know that he was insisting that you put it in writing?

A Mr. Hellerstein, from the first day that I met Dr. Stern, there was always something that he wanted to put in writing. So I mean one more just didn't make any difference. It didn't concern me.

Q But he never did quite get you to put something in writing that was firm?

MR. HILL: I'm going to object to that. That's just argument.

THE COURT: Overruled.

A Quite to the contrary, I think you will find, as I have seen here, that there were a number of documents that were put in writing and what we see here are mostly the

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formally typed. I assure you that there were perhaps 50 in handwriting which were put into writing which were subsequently just thrown away.

Q Did you say 50?

A I'm guessing, because there were many.

Q Because we asked for the production of every single one and we have in evidence every one that was produced.

A I just told you they were probably discarded by ourselves or by Dr. Stern.

MR. HILL: Your Honor, I think that calls for a response. We have produced everything that we have been able to produce from the files of Satra.

THE COURT: Very good.

MR. HILL: It is unfair.

MR. HELLERSTEIN: I believe that, Mr. Hill.

MR. HILL: I don't think this is the forum for that.

THE COURT: We don't have to have a discussion, because Mr. Oztemel said there were but there are no longer. I gather what is likely to have happened is that somebody wrote something down as a proposal and then it was not necessarily accepted, so it was disposed of.

THE WITNESS: That's right, sir.

1
2 Q Mr. Oztemel, before this particular document,
3 Exhibit D, was there ever another one that you considered
4 as committing yourself?

5 A Let me understand your question. Before this
6 document --

7 Q Of August 31 -- September 1.

8 A Were there any others?

9 Q Were there any others that you considered as a
10 firm commitment of Satra Corporation?

11 A In the sense that they were not signed, I would
12 have to say no. In the sense that I was ready to sign but
13 Dr. Stern would not sign for some reason or another, in
14 that sense, yes.

15 (Continued on page 688.)
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Q The question was, Mr. Oztemel, whether there was any other one before the one that is before you, that is, the one dated August 31, the proposal of September 1 and the acceptance, that you regarded as a firm commitment on the part of Satra Corporation.

THE COURT: You will have to define what you mean by the word "commitment," because it can mean either putting one's self in a position in which one is legally bound or it can simply mean make an offer which is subject to acceptance. Which do you mean?

MR. HELLERSTEIN: I'll try to define my term.

Q Before this particular one in front of you, August 31, was there ever another one that you considered as binding as far as you were concerned morally or legally and that Dr. Stern had the right to accept without your changing it?

A I don't know legally, but --

Q Let's talk about morally.

A Morally, I believe there were some documents that were drafted which met with my approval but were not accepted by Dr. Stern and therefore not concluded.

Q The only two that we have identified so far are Plaintiff's Exhibits A and B (handing). Exhibit A is the one that you identified in your testimony as the one that

1 jgd
2 Dr. Stern typed up after your August 10 meeting, and Exhibit
3 B is the one that you said could have been your proposal or
4 his proposal, and it is dated August 25, on your stationery.

5 With respect to those two, Mr. Oztemel --

6 A Yes.

7 Q -- could you consider, either as expressing a
8 commitment in the sense that Satra Corporation was bound to
9 it in a moral sense or a legal sense, as you understood it,
10 giving Dr. Stern the right to accept or reject them?

11 A Of course.

12 Q Which ones? Both?

13 A For instance, at some point in time when
14 Dr. Stern expressed the interest of becoming an employee of
15 Satra and I found that not undesirable, I told Dr. Stern
16 that, "Yes, I'll be happy to have you join Satra organization.
17 Now, that I considered to be a moral commitment.

18 There was a time when I told him that -- I
19 don't know the figure now -- that perhaps I would pay him
20 \$40,000 a year for his services. Had he accepted, I would
21 consider that a moral commitment.

22 Q How about Exhibit B, which expressed a commitment
23 for you to pay him \$90,000 a year and had some other
24 aspects to it? Did you consider that a firm commitment, as
25 we've been using it, when you signed that, or gave him that?

1 2jqd

2 A Yesterday I was asked this and I tried to
3 remember. I believe that this was a proposal that almost
4 got to be a reality, but for reasons I don't remember now
5 it wasn't signed.

6 Q I'm not sure yet we've established it. Do you
7 remember any particular instance prior to the August 31 -
8 September 1 instance -- an instance meaning something you
9 can relate and tell to the jury -- do you remember any
10 particular instance where you made a firm commitment in
11 terms of an offer that Dr. Stern could accept or reject?

12 A I just told you, sir, that the one at least that
13 I remember, I offered Dr. Stern a job at \$40,000 a year.

14 Q Did he accept it?

15 A No, he did not.

16 Q Do you remember any other instance?

17 A No, I don't remember specifically, except that
18 I do remember there were several.

19 Q But you can't remember any particular one?

20 A Oh, no.

21 Q All right. Let's talk about Exhibit B. Do you
22 have Exhibit B? It is a proposal of Satra dated August 25.

23 A Yes, I do.

24 Q Do you remember giving that to Dr. Stern?

25 A No, I don't remember giving it to him. I do

3jgd

Oztemel-cross

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2 recognize the type, however. This is our type, I mean, on
3 our typewriter.

4 Q I think you testified that you didn't recall
5 whether it was your proposal or Dr. Stern's proposal. But
6 would you agree, Mr. Oztemel, since it is on your letterhead
7 and you recognize the typewriting, that it is your proposal?

8 A No, sir.

9 MR. HILL: Objection, your Honor.

10 THE COURT: The answer is no, sir.

11 A (Continuing) I mean, because it is on our
12 stationery, because it is our typewriter, both of which
13 Dr. Stern used quite liberally, I wouldn't say that it
14 makes it our proposal. It could have been.

15 Q This is titled Memorandum of Agreement Between
16 Dr. Marvin Stern and Satra Corporation. Is it your
17 testimony that Dr. Stern could have typed this up on Satra
18 Corporation's letterhead and taken it back for himself?

19 A No. I think he could have very well written
20 or dictated it to Miss Van Staveren, who probably typed it
21 up. On the other hand, he probably typed it up himself.

22 Q And possibly you could have had Mr. Mott type
23 it up?

24 MR. HILL: Again, I just can't hear you,
25 Mr. Hellerstein.

4jgd

Q And possibly you could have had Mr. Mott type it up?

A I don't know, sir. Another secretary, perhaps.

Q It could have been something done at your direction?

A No, not necessarily mine. Also Dr. Stern's because he was very much at home in our office and --

Q I understand you said --

THE COURT: The question is whether it could have been at your direction, not whether it was.

THE WITNESS: It could have been. Now, the only thing I may have to rule out is that it was typed by Miss Van Staveren, because she would usually put the initials there.

Q So we have established that it was not Miss Van Staveren's?

A That is one safe assumption, yes. And I didn't type it.

Q And you didn't type it?

A And I didn't type it, no.

Q But it could have been Dr. Stern. It could have been prepared by someone else in your organization. At this moment you can't --

A Yes.

5jgd

Oztemel-cross

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THE COURT: I take it what Mr. Oztemel is saying is he doesn't know who typed it and therefore, at least as far as we are all concerned, it could have been anybody there.

MR. HELLERSTEIN: Okay. Let's take it from there.

Q The first paragraph talks about joint best efforts to consult for and help represent in the USSR selected U.S. companies.

If you recall, Mr. Oztemel, did you and Dr. Stern discuss IBM in the context of those companies at that time?

A Did we discuss IBM as a member of that group?

Q Yes.

A We could have. I don't remember.

Q You don't recall?

A I don't remember.

Q Stromberg Carlson?

A Stromberg Carlson certainly was discussed, as IBM was discussed. But whether it was in conjunction with this one, I couldn't tell you.

Q Do you remember any companies that were discussed in conjunction with that paragraph 1?

THE COURT: I was going to point out to

Gjgd

1
2 Mr. Oztemel that Exhibit B precedes Exhibit C, which is the
3 one document that is signed.

4 MR. HILL: If your Honor please, his testimony
5 is that there were discussions going on all throughout this
6 period.

7 THE COURT: I know what his testimony is,
8 Mr. Hill. But he said he wasn't sure whether IBM was one
9 of the companies referred to as among the group specified
10 in the August 25 memorandum, and I was simply going to point
11 out to Mr. Oztemel that the August 25 memorandum, Exhibit B,
12 preceded Exhibit C, which was the so-called agreement, by
13 only six days.

14 And I ask you, since Exhibit C does refer to IBM
15 and to Stromberg Carlson, whether that would refresh your
16 recollection as to whether they were included in the group
17 referred to in the August 25 memorandum.

18 THE WITNESS: It does not. However, it is logical
19 to expect that since they were so close that the IBM was in
20 discussion.

21 THE COURT: All right.

22 BY MR. HELLERSTEIN:

23 Q Do you remember whether you and Dr. Stern had
24 agreed that the ratio of sharing -- I think that it is
25 referred to here as proportionment of income therefrom --

1 with respect to Stromberg Carlson and IBM would be 75 percent
2 to you and 25 percent to him with respect to other terms
3 mentioned in this document, Exhibit B? Do you remember that?

4 A I don't remember, but I'm reading with you.

5 Q But you are what?

6 A I can follow the document, but I don't
7 remember the terms you are now telling me.

8 Q Do you remember discussing with Dr. Stern that
9 you would pay him a fee -- I read from Paragraph 4 of
10 Exhibit B -- of \$7,500 per month? That is \$90,000 a year.
11 Do you remember either of those terms being used in respect
12 to this document?

13 A I have no recollection now, but it is entirely
14 possible.

15 Q Do you remember, in other words, Mr. Oztemel,
16 that on or about August 25 you gave a firm proposal to
17 Dr. Stern that you and he would share in the benefits, in the
18 revenue from an IBM deal with Russia, on a 75 and 25 percent
19 ratio and that in addition you would pay him \$90,000 a year?
20 Do you remember that?

21 A I'm looking at the document, as I told you.
22 Unfortunately, I have no recollection of specific discussions
23 pertaining to this agreement.

24 Q You testified the other day, if I recall
25

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Oztemel-cross

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2 correctly, that you had a telephone conversation with
3 Dr. Stern, you being in New York and he being in Los Angeles,
4 over the weekend, a day or two or three after this document
5 was set down on paper.

6 A I don't believe I said that. As I recall, and
7 since yesterday I recall well, I said I had received a
8 t ne call from Dr. Stern some weekend. He was calling
9 me to say he was accepting one of the proposals.

10 As I told you, there were many. I didn't know
11 which one he was accepting. But, as I said, it could have
12 been this one. I don't know one way or the other.

13 Q I read to you from page 633 of the transcript
14 and ask if it refreshes your recollection. Mr. Hill asked
15 you, line 19:

16 "Q Do you recall having a telephone conver-
17 sation with Dr. Stern on the subject matter of Plaintiff's
18 Exhibit B?

19 "A I remember having a telephone conversation
20 with Dr. Stern. I believe the conversation was over a
21 weekend, when he called me from California to say that he had
22 accepted an agreement."

23 A I told you exactly the same thing now, sir.

24 Q So, in other words, it could have been a
25 different weekend, you don't recall?

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Oztemel-cross

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2 A It was a weekend.

3 Q And I go on:

4 "Q Now, it could well have been this agree-
5 ment or it could have been another one. He accepted it.
6 We changed a lot of agreements, so I cannot tell you."

7 Do you recall which particular agreement we are
8 talking about? Was it the \$40,000 salary, Mr. Oztemel?

9 THE COURT: Your question is not clear. Are
10 you asking the witness whether he recalls what agreement
11 you were talking about at the time of the deposition or now?

12 MR. HELLERSTEIN: No. This is yesterday's
13 testimony, your Honor.

14 THE COURT: Yesterday?

15 MR. HELLERSTEIN: Yes.

16 MR. HILL: I make the same objection, your Honor.

17 THE COURT: I don't know what your earlier
18 objection was, but I am inclined to sustain it anyway.

19 Q Let me clarify the question. Does reading this
20 testimony refresh your recollection as to which agreement
21 you were referring to yesterday?

22 A No, sir, unfortunately not.

23 THE COURT: Mr. Hellerstein, I'm going to
24 suggest we have an afternoon recess at this time.

25 (Recess.)

2 BY MR. HELLERSTEIN:

3 Q Towards the end of Mr. Hill's questioning, you
4 said, and correct me again if I am wrong, in the conver-
5 sation when you and Dr. Stern came together and you told
6 Dr. Stern that you no longer could consider that you had an
7 obligation to him, you said there were two points. One,
8 you acknowledged he had brought IBM to the deal but you were
9 disappointed because he would not carry 50 percent of the
10 load.

11 Is that substantially what you said?

12 A I believe so.

13 Q And was the second reason that you gave which was
14 the justification for your stating to him that you considered
15 that your obligations, if any, were at an end, is that
16 correct?

17 MR. HILL: Objection, your Honor, for all the
18 same grounds that I expressed before.

19 THE COURT: I think this is referring to the
20 testimony of Mr. Oztemel on direct examination today just a
21 short time ago. It is a perfectly fair question.

22 Do you want it repeated to you?

23 THE WITNESS: No, sir. I think I remember it.

24 I don't recall, and I don't believe that I gave
25 a distinction as to what my reason was to consider that we

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2 were -- that I believed he had misrepresented. But I
3 believed, as I said, he had fulfilled a function in one
4 instance which I recognized, and I wanted him to be compen-
5 sated for that.

6 The second function, which was also misrepresented
7 but not fulfilled either, that I didn't feel I wanted to
8 compensate him for.

9 Q What was that function that he did not perform?

10 A The function that he didn't perform, which was
11 also misrepresented to me, was first of all, that he had
12 any services which were so important that without it we
13 would never have had an agreement with IBM.

14 Q What did he have to do, Mr. Oztemel? That's my
15 question. What did he have to do?

16 A I can understand your impatience, because I
17 felt exactly like that for months when, including myself,
18 a number of my staff tried to get from Dr. Stern what was it
19 that he was to do.

20 Q You made this agreement with him of August 31.

21 A Yes.

22 (Continued on page 700.)

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PM 3b

765 A

1 jgmch

Oztemel-cross

700

2 Q Did you ask him what he was going to do?

3 A We certainly did.

4 Q And what did he say to you?

5 A He said we will define all these functions and all
6 my services. And we had agreed that all these things together
7 with other definitions would go into the final contract
8 which we both agreed would eventually be drafted.

9 Q What was he supposed to do, as you understand
10 it?

11 A I was as anxious as you are now to find out what
12 he was to do. All I knew was that he was to do something
13 which was so essential that without it we would have no
14 IBM deal.

15 Q You had an IBM deal.

16 A We had an IBM deal with the understanding, at
17 least on my part and my organization, that Dr. Stern was
18 with us and he was ready and willing to service the
19 account at the technical end. As to the definition of
20 "technical end," as I said, the agreement with Dr. Stern
21 was to be defined in the final contract.

22 Q Is it the fact that you did not have any specific
23 obligations for him to do? Is that the fact?

24 A That I did not have?

25 MR. HELLERSTEIN: With leave.

2 jgmch

Oztemel-cross

2 Q Isn't it the fact that you never called upon him
3 to do anything specific that he refused to do?

4 A It was hard for me to call on Dr. Stern for
5 anything specific --

6 Q Answer the question, please, Mr. Oztemel:

7 Did you ever ask Dr. Stern to do something that
8 he did not do?

9 A Among other things, I asked him to tell me what
10 he was supposed to do, and that he did not do.

11 Q Did you ask him to do any act, to see any
12 person, to write any letter, to make any telephone call
13 that he did not do?

14 A No. Quite the contrary: He even did things I told
15 him not to do.

16 Q You had no problem about his doing things that
17 you asked him to do?

18 A I never asked him anything.

19 Q Is it the fact that you did not require any
20 specific thing on his part?

21 A Please understand that I was not, and I am still
22 not, the client. The client we were both trying to serve
23 is IBM. So it is not -- it wasn't my function to ask Dr.
24 Stern to do things. It was our client's.

25 Q At the time you told Dr. Stern that you did not

1 3 jgmch

Oztemel-cross

2 consider you had any more obligations to him, was there
3 any performance required of Dr. Stern?

4 A If you will pardon me, I would like to correct
5 that. I have never told Dr. Stern that I don't owe him
6 anything. I've always told him that no matter how, no
7 matter through what means, he brought IBM, and that I
8 recognized that I owed him something. So I was --

9 Q Did you tell him that you would stop making
10 payments to him under the IBM contract?

11 A Yes.

12 Q You told him that.

13 A Payments to him under the IBM contract, yes, sir.

14 Q You testified a few minutes ago that you offered
15 to pay him \$100,000.

16 A That's right. That's correct.

17 Q And that's different from what you said before?

18 A No.

19 Q In your opinion?

20 A No.

21 THE COURT: Different from what the contract
22 might call for, is that what you have in mind?

23 Q You told him that you would not make any more
24 payments under the contract?

25 THE COURT: Mr. Hill?

4 jgmch

Oztemel-cross

2 A That's right.

3 Q That's your testimony.

4 A That's right.

5 Q I ask you again, was there any performance
6 required of Dr. Stern at the time you told him this?

7 A I repeat --

8 Q Yes or no, Mr. Oztemel?

9 A On my part?

10 Q Was there any performance required of Dr. Stern
11 at the time you told him this, that you would make
12 no more payments under the IBM contract?

13 A By whom?

14 Q By Dr. Stern.

15 A No.

16 Q There was --

17 A Who would have required his services?

18 Q Let me ask you again, Mr. Oztemel:

19 Was there any services required of Dr. Stern
20 under your agreement with him that he was required to
21 perform at the time you told him you would make no more
22 payments to him under the IBM contract?

23 A By that time I had found out that there were
24 none.

25 Q There were no performance obligations on Dr.

1 5 jgmch

Oztemel-cross

2 Stern's part; is that your testimony?

3 A No.

4 THE COURT: Let me see if I can make this clear,
5 because it is a fairly important question and the jury
6 certainly wants to understand both the question and the
7 answer.

8 As I understand it, Mr. Hellerstein is trying to
9 find out this, Mr. Oztemel. At the time that you told
10 Dr. Stern that you believed that your relationship should
11 be terminated --

12 THE WITNESS: Yes.

13 THE COURT: -- was there anything pending which
14 he was obligated to do for Satra which, in your opinion,
15 he had not done?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: Is that your question?

18 MR. HELLERSTEIN: Yes.

19 Q Will you tell us what it was?

20 A Yes, I will, with pleasure.

21 We had signed a contract with IBM. IBM, at least
22 on the surface, at least according to figures, especially
23 according to Dr. Stern's figures, were to pay us, let's
24 say 3-1/2 percent on \$50 million, which was the minimum that --

25 Q Mr. Oztemel, the question is what he had to do --

6 jgmch

Oztemel-cross

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2 A I have to explain it. .

3 Q -- not what IBM had to do. What Dr. Stern had
4 to do.

5 THE COURT: Mr. Hill, I see you rise, and I
6 ordinarily like to let a witness explain in his own way,
7 but I hope there is a more direct way to answer it.

8 Could you first tell us what you think it is that
9 Dr. Stern had not done? And then, if you wish to explain
10 why you concluded that, you can amplify.

11 THE WITNESS: Your Honor, regrettably I have to
12 tell counsel that we were looking at the receipt of a
13 very large commission income. IBM obviously was not making
14 a gift to us. They expected certain things from us.

15 THE COURT: All right.

16 THE WITNESS: On my part I had understood what I
17 had to do. But the other part, which was not defined
18 because of Dr. Stern, was still to be performed. Now,
19 whatever that was, Dr. Stern did not perform that and that's
20 what I understand.

21 THE COURT: Are you implying that he should have
22 performed it prior to that time?

23 THE WITNESS: Yes, your Honor; if there was indeed
24 a need for his performance, he should have performed it.

25 THE COURT: But --

7 jgmch

Oztemel-cross

2 THE WITNESS: If there wasn't, he shouldn't
3 have told me that there was.

4 Q Can you answer the question?

5 A I just did.

6 Q Was there anything that Dr. Stern was obligated,
7 as you understood it, to do --

8 THE COURT: Mr. Hellerstein, I think that Mr.
9 Oztemel has answered, and you can argue to the jury what
10 significance you attach to it.

11 Q Mr. Oztemel, were you asked this question in
12 your deposition on May 4, 1972 at Page 121, and did you
13 give this answer:

14 "Q Prior to the meeting in late 1971 when you told
15 Dr. Stern you would not make any further payments under
16 that agreement, did you prior to that time tell anyone at
17 Satra that you were unhappy about the performance of
18 Dr. Stern on behalf of Satra?

19 "A There was no performance required at the time,
20 so I couldn't have made such a statement."

21 Do you remember giving that testimony?

22 A Of course.

23 That is very dramatic, but what am I to do? Just
24 ignore it? All right.

25 Q Were there any technical services that Satra had

8 jgmch

Oztemel-cross

to perform to IBM?

A I think that is a question that you must necessarily ask Dr. Stern. I didn't negotiate the contract.

THE COURT: Is the answer that you don't know?

THE WITNESS: I don't know, sir. I'm sorry.

Q Were you asked this question on your deposition on May 18, 1972, Page 593, Line 15, and did you give this answer:

"Q Was it your understanding of Satra's obligation under the IBM contract that it was to provide IBM with the technical assistance under the letter of the contract?

"A It is also not clear to me. We were doing a selling, marketing and financing job for IBM. It was not to provide them with technical services."

Did you give that answer?

A Yes, I did.

Q Was it truthful?

A Of course.

Q I show you Exhibit KK for identification (handing). I ask you to look at the services requested by IBM to be rendered by Satra as described in Paragraph A of that agreement of that memorandum on the first page and as described in Paragraph B of that document on the first page.

1 9 jgnch

2 A Yes, sir.

3 Q Which one of those nine services was Dr.
4 Stern to perform?

5 A None of it.

6 Q This was eight days after he accepted the
7 document on August 31st, wasn't it?

8 THE COURT: Mr. Hellerstein, don't raise your
9 voice.

10 Q This was eight days after that document of
11 September 1st was performed, wasn't it?

12 A It was.

13 If you are asking me why it was not there, I
14 will be pleased to tell you.

15 Q Your counsel will ask that question if he thinks
16 it is appropriate.

17 A I shall wait.

18 MR. HELLERSTEIN: I offer Exhibit KK into
19 evidence.

20 MR. HILL: No objection.

21 THE COURT: All right. It is received in evidence.

22 (Plaintiff's Exhibit KK for identification was
23 received in evidence.)

24 MR. HELLERSTEIN: May I read the paragraphs I
25 refer to to the jury, your Honor?

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1 10 jgmch

Oztemel-cross

2 THE COURT: Yes.

3 MR. HELLERSTEIN: This is a memorandum by James
4 Henry Giffen to Dr. Stern. Paragraph A is titled
5 "Services requested by IBM to be rendered by Satra."

6 "1. Visas and travel.

7 "2. Office facilities in Moscow.

8 "3. Arranging of appointments in Moscow.

9 "4. Market information regarding IBM's
10 possibiliities in the Soviet market.

11 "5. Advice and lectures on the trade process.

12 "6. Introductions to appropriate government
13 officials.

14 "7. Advice on protocol.

15 "B. Financial assistance requested by IBM to
16 be rendered by Satra:

17 "1. Influence large purchases of IBM products
18 through Satra's purchase of Soviet goods.

19 "2. Barter, switch transactions, clearing funds
20 or other unique financial arrangements, advice and
21 participation when necessary."

22 The memorandum is dated September 9, 1971.
23
24
25

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PM 4a

1 reach

Oztemel-cross

2 Q I show you Exhibit JJ for identification, a
3 memorandum from Mr. Hendricks of IBM to Mr. Witham of
4 IBM.

5 Mr. Oztemel, you had meetings with IBM --

6 MR. HILL: Excuse me just one second.

7 Can I see a copy of that?

8 Q Mr. Oztemel, you had meetings with IBM, accompanied
9 by Dr. Stern; is that correct?

10 A Yes.

11 Q In those meetings did you tell the officials of
12 IBM what Satra could do for IBM?

13 A Yes.

14 Q Is this memorandum on the first page a summary
15 of the services that you told IBM that you could do for
16 them?

17 A Approximately, yes.

18 Q You met with IBM, did you not, on September 3rd;
19 is that correct?

20 A It's possible. I don't recall the exact date,
21 but it's possible.

22 Q You don't deny that?

23 A I don't recall it, sir.

24 Q Do you have any calendar to help you refresh
25 your recollection?

2 rgmch

Oztemel-cross

2 A No, I don't have one with me.

3 Q Is there any other service that you told IBM
4 that Satra could do that is not mentioned in this memorandum?

5 A There is a service which we -- "we," meaning
6 the joint venture of Dr. Stern and Satra, had supposedly
7 told IBM that would be performed which is not in this
8 memorandum, yes.

9 Q Do you recall if that subject was a subject of
10 conversation at the meeting of September 3rd?

11 A Not specifically, but nevertheless I would have
12 to say yes to that.

13 Q The question is yes or no, Mr. Oztemel, do
14 you remember or do you not remember?

15 A Then I would say yes.

16 Q Who said that?

17 A It was said IBM, referring to the sensitivity
18 of IBM regarding certain services, that they were very
19 careful not -- well, let's say among other things not
20 to put it in a document the type of services which they
21 were sensitive about.

22 Q Did they say they wouldn't put it into a document?

23 A They did not say it specifically because Dr.
24 Stern at that moment -- I think the conversation was taken
25 away from the subject, but it was not, no, there.

1 3 rgmch

Oztemel-cross

2 Service was not mentioned.

3 Q Could you please just answer the question, Mr.
4 Oztemel?

5 THE COURT: He said they didn't say it specifically.

6 Q Who said anything about the service that Satra
7 could perform for IBM that is not mentioned in this memo-
8 randum?

9 A May I please tell you again that there were
10 combined services on the part of Dr. Stern and Satra
11 which we understood was the subject of the contract with
12 IBM.

13 Q My question to you, Mr. Oztemel --

14 A Yes.

15 Q Let me put it this way:

16 Did you tell anything to the IBM officials
17 as to a service that Satra could perform for them that is
18 not mentioned in this document?

19 A I would not, because Dr. Stern had specifically
20 asked me not to allude or to mention anything that
21 pertained to his own services which he was to define
22 some day.

23 Q When did Dr. Stern say that to you?

24 A He said it to me before any meeting; on other
25 occasions when we were talking about the subject.

1 4 rgmch

Oztemel-cross

2 Q Did he tell you that you should not tell IBM
3 what Dr. Stern could do for IBM; is that what you are
4 telling me that he said?

5 A No, that's not what he said, but he said we must
6 notarize and issue with IBM regarding some services,
7 technical and otherwise, about which they are sensitive.

8 Q For example, what would they be sensitive about?

9 A Technical services.

10 Q Why would they be sensitive about them?

11 A Because -- obviously, as I said, as closely as
12 I can define it, there must be some sensitivity in IBM
13 regarding anti-trust or what-not. I am surmising now, because
14 I read the papers like I do.

15 Q I will read Page 121 if you want me to to refresh
16 your recollection that there were no technical services
17 to be performed.

18 A You asked me part of the question and I will have
19 to give you part of the answer just like it appears there.

20 Q Did you answer there was no performance at the time
21 on the part of Dr. Stern that was required? Did you answer
22 that question?

23 MR. HILL: Objection, your Honor. That's
24 already in the record.

25 THE COURT: Sustained.

1
2 Q Did Dr. Stern tell IBM your presence at any
3 time what he could do for IBM?

4 A My presence with IBM --

5 THE COURT: This doesn't require a complex
6 answer, Mr. Oztemel. It just asks whether you met with
7 him once or a hundred times, during the time that you met
8 with Dr. Stern did he ever tell IBM what he was going to
9 do?

10 THE WITNESS: No, your Honor, although I was
11 about to say that our meetings were --

12 MR. HELLERSTEIN: I think the question is
13 answered. He answered no, and that's the answer.

14 MR. HILL: Please, Mr. Hellerstein.

15 THE COURT: Actually Mr. Hellerstein is right
16 and the answer to Mr. Hellerstein's question is no, he
17 didn't make any statements.

18 THE WITNESS: That's correct.

19 Q Let's go back to this memorandum of November 8th,
20 Exhibit JJ, referring to a meeting of September 3rd. Were
21 there any services that Satra could perform for IBM that
22 you mentioned at this meeting of September 3rd that is not
23 mentioned in this memorandum, that you can recall?

24 A Are you asking about services that Satra could
25 perform or Dr. Stern could perform?

1 Q I will put the question again, Mr. Oztemel.
2 Did you tell IBM of any services that Satra would perform
3 for IBM that is not mentioned in this memorandum?
4

5 A I told IBM the services that Satra itself was
6 capable of performing.

7 THE COURT: Those are the ones that are listed?

8 THE WITNESS: Those are the ones that are listed.

9 Q Did you or Dr. Stern tell of any services that
10 this joint venture of Stern and Satra could perform,
11 that is not mentioned in this memorandum?

12 A Not in my presence.

13 Q That is all I am asking about; in your presence.

14 A Not in my presence.

15 Q Did you, or Dr. Stern in your presence, tell
16 IBM at any time of something that Dr. Stern and Satra
17 could do for IBM, that is, anything different from what
18 is said here in this memorandum?

19 A Dr. Stern had told me that there were such
20 discussions with him and IBM, but not in my presence.
21 That's what I heard from Dr. Stern.

22 Q So the answer to these questions is that there
23 were no other services that Satra could perform for IBM
24 or that Stern and Satra could perform for IBM except
25 those mentioned in the September 3rd meeting?

1
2 A I don't know. We told them the services we were
3 capable of performing. We can stretch our ability and
4 perform one more service, but this was what we could
5 do at the time.

6 MR. HELLERSTEIN: I offer the document in
7 evidence.

8 MR. HILL: No objection, your Honor.

9 THE COURT: Received in evidence.

10 (Plaintiff's Exhibit JJ for identification
11 received in evidence.)

12 MR. HELLERSTEIN: This is a memorandum of
13 September 8, 1971 from Mr. Hendricks of IBM to Mr. Witham
14 of IBM, subject: Satra Corporation.

15 "On September 3, 1971 Ralph and I talked to
16 officials of the above company about the services which
17 they could provide for us.

18 "These consist of two types: General services
19 that we would require, irrespective of specific orders,
20 and specific services of a financial nature, similar to
21 the ones for which a need has been identified in the
22 Eastern Block countries.

23 "The first type of services comprise the following:

24 "Visas and travel.

25 "Moscow office facilities.

xxx

"Arrange appointments.

"Supply information on need for computers and foreign expansion availability.

"Advice on governmental administrative practices.

"Advice on local technical capability.

"Introduction to appropriate governmental officials and advice on protocol."

Q On September 3rd or September 8th or September 9th, or any time around that time, Mr. Oztemel, did you ever say to Dr. Stern, in words or substance, anything of the nature of a complaint that he was supposed to do more than the August 31st agreement required him to do?

A No.

Q Do you know of anything more that Dr. Stern was supposed to than you knew at the time?

A Yes, sir.

Q What?

A He should have told me the truth.

Q What specifically, Mr. Oztemel? What specifically did Dr. Stern have to do, as you know it now, that you did not know on September 3rd?

A I told you, Mr. Hellerstein. I believe he should have told me the truth.

Q What, specifically, did he have to do with respect

1 3 rgmch

Oztemel-cross

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2 to IBM that you know now that you did not know then?

3 A I now know that there was nothing he could do
4 and I now know there was nothing that IBM required of him.
5 Therefore, he didn't deserve 50 percent.

6 MR. HELLERSTEIN: I move to strike, your Honor.

7 THE COURT: I sustain the objection.

8 You didn't answer the question, what he was
9 supposed to do for IBM, which was what the question was.

10 A As I know now?

11 Q What difference do you now know as to what Dr.
12 Stern was supposed to do for IBM than you knew on
13 September 3rd?

14 A I now know that Dr. Stern did not tell me the
15 truth.

16 MR. HELLERSTEIN: I move to strike, your Honor.

17 THE COURT: I will strike that because that is
18 for the jury to decide. That is the very request here.

19 Let me put it here. I think an admissible
20 answer would be you now believe that he didn't tell you
21 the truth whereas at the time you did believe he did
22 tell the truth.

23 MR. HELLERSTEIN: The question, if your Honor
24 please, is what Dr. Stern was supposed to do for IBM.

25 THE COURT: What I think you have done is you

10 rgmch

Oztemel-cross

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1 have gone to a fare-thee-well. I don't think you are
2 ever going to get an answer, Mr. Hellerstein, and you
3 can comment on the lack of an answer, if you want.
4

5 MR. HELLERSTEIN: It may have been that I have
6 done it to a fare-thee-well, and I don't need an ultimate
7 permission, but I want an answer to the question if the
8 question is appropriate in form.

9 MR. HILL: I personally don't understand the
10 question and I haven't since the first time it was asked.

11 THE COURT: I understand it and I don't know if
12 it's completely answered, and I don't know if Mr.
13 Hellerstein's finding that asking it over and over again
14 will accomplish any more.

15 MR. HELLERSTEIN: I will take your Honor's hint
16 and move on.

17 MR. HILL: I do except to your Honor's comment
18 on that with respect to the witness' answer.

19 THE COURT: Let me state that of course it is
20 for the jury to determine what they think about all of
21 this question and answer of every witness.

22 Q You testified on direct examination, did you not,
23 that it was Mr. Watson, the chairman of the board of IBM
24 that controlled the decision of IBM whether to sell to
25 Russia or not; is that correct?

1 11 rgmch

Oztemel-cross

720

2 A Not as positively as that. I said through
3 my discussions with executives of IBM I had gotten the
4 impression that that type of decision was made at Dr. Watson's
5 level.

6 Q Did you believe that Dr. Stern could control or
7 influence Mr. Watson's decision-making process?

8 A I didn't care, but that's what Dr. Stern was
9 telling me, so I believe it, of course.

10 Q But you didn't care?

11 A No, I didn't care how he influenced what.

12 MR. HELLERSTEIN: So we can take that out of
13 the case, can't we, Mr. Hill?

14 MR. HILL: Are you examining him or me, Mr.
15 Hellerstein?

16 Q Did you believe at any time that Dr. Stern
17 could influence IBM's decision as to whether or not IBM
18 would use Satra as an intermediary in connection with
19 sales to Russia?

20 A Mr. Hellerstein, I will answer the question this
21 way: I believed Dr. Stern. That's what Dr. Stern was
22 telling me and, therefore, I believed that fact, yes.

23 Q So the answer is yes?

24 A Yes, sir.

25 Q Whom at IBM was Dr. Stern to influence in respect

1 to that decision?

2 A My impression was that he was to influence Mr.
3 Watson.
4

5 Q Did Dr. Stern ever say in your presence that he
6 knew Mr. Watson?

7 A No, but that the Ambassador did intimately.

8 Q You said on direct examination that you didn't
9 even know that Ambassador Thompson was ambassador to
10 Russia. Didn't you say that?

11 A I said, without the title of Ambassador, I
12 didn't recognize the name Thompson.

13 Q But, nevertheless, your testimony is that
14 Dr. Stern's mention of Ambassador Thompson persuaded you
15 that he could influence Mr. Watson's decision to use an
16 intermediary?

17 A That's what Dr. Stern told me and I believed him.

18 Q Do you know what the decision-making process is
19 at IBM?

20 THE COURT: Now, or did he know then?

21 MR. HELLERSTEIN: Then.

22 A Precisely, no. I have an idea of the decision
23 making process in any organization, but that's just general.

24 Q Did you have any impression when you were going
25 to meetings with Dr. Stern whether he knew any of the

1 IBM officials you were meeting or whether he was meeting
2 them for the first time?

3
4 A I had no impression one way or the other, but
5 my general impression was that, no, he didn't know anybody,
6 that he had no long-standing friendship there.

7 Q He had no long-standing friendships with those
8 people?

9 A With the people we met in New York City.

10 Q Those were the people that made the decision,
11 as far as you knew, whether to employ Satra or not, weren't
12 they?

13 A No, sir. My understanding then, and even now,
14 is that that type of decision was made at Mr. Watson's
15 level.

16 Q Do you know for a fact whether or not it was
17 made at Mr. Watson's level?

18 A As factual -- as close to that as you can come,
19 yes, sir.

20 Q How do you know it?

21 A By having talked to enough people, including
22 Mr. Jones.

23 Q Mr. Jones told you that?

24 A Mr. Jones told me that Mr. Watson's opinion in
25 such matters weighed very heavily in the organization, yes.

1 14 rgmch Oztemel-cross 723
2 Q Did Mr. Jones also tell you that he was favorably
3 impressed by the fact that Dr. Stern was connected with your
4 organization and that weighed on the decision to use
5 Satra?

6 A That he was -- I don't recall.

7 Q Let me read to you from testimony you gave again
8 on May 18, 1972, at Page 645, and ask if it refreshes
9 your recollection.

10 MR. HILL: Would you just wait a second?

11 MR. HELLERSTEIN: Sure.

12 (Pause.)

13 Q The testimony begins on that subject on Page 644.
14 At the bottom of 644, you were asked this:

15 "Q Was anything said about Dr. Stern during that
16 conversation, referring to a conversation you had with
17 Mr. Jones earlier in 1972?"

18 You answered:

19 "A Yes."

20 A Would you tell me where it was? Was it a telephone
21 conversation --

22 MR. HILL: Why don't you show the witness the
23 testimony?

24 THE COURT: I think it would be better if you
25 let him read whatever you have in mind.

15 rgmch

Oztemel-cross

724

Q Start at the bottom of 643, Mr. Oztemel,
where you started talking about a conversation you had
with Mr. Jones. I don't think you identified whether --

A 643?

Q The bottom of 643.

A Where it says, "I don't know"?

Q Yes. You read it to yourself.

A "Do you know whether IBM has ever conducted" --

Q Read it to yourself.

THE COURT: Read it to yourself so you will
understand it, and Mr. Hellerstein can ask you questions
about it.

Q Let me read to you out loud the question on
Page 644 --

THE COURT: Wait a minute. I don't think Mr.
Oztemel is finished reading it.

MR. HELLERSTEIN: This is right where he probably
is, your Honor.

A Yes, I read it.

Oztemel-cross

rqd

Q Let me read to you at page 644, line 13:

"Q Some time this year you discussed
Dr. Stern with Mr. Jones" --

THE COURT: This year being 1972, you said?

MR. HELLERSTEIN: Yes.

Q "A I did not say that. You asked me if they
had run any investigations. I remember that in some conver-
sation they had said they checked me out. I had checked
out well together with Dr. Stern and he had checked out
well."

Do you remember giving that testimony?

A I don't, but I am sure that was true.

Q It goes on:

"Q And this was told to you by Mr. Jones
this year?

"A Yes.

"Q Both of those statements?

"A Yes.

"Q Was anything said about Dr. Stern during
that conversation?

"A Yes.

"Q What?

"A He said that Dr. Stern was introduced to
Mr. Jones by the Ambassador. The Ambassador told him that

1 Brgd

Oztemel-cross

2 Dr. Stern was an employee of Satra and knowing Dr. Stern's
3 background they were quite happy that he was an employee of
4 Satra."

5 Do you remember giving that testimony?

6 A I don't, but I'm sure that that's so.

7 Q Does that refresh your recollection that
8 Mr. Jones -- incidentally, what position did Mr. Jones
9 occupy?

10 A At that time I believe it was president of
11 World Trade.

12 Q He was the highest official, was he not, of the
13 company of IBM that did business with you?

14 A He was the -- if Chairman was higher, then there
15 was somebody else, but he was the president of IBM World
16 Trade.

17 Q He was either the most important person or next
18 to the most important person in IBM World Trade; is that
19 correct?

20 A That is right.

21 Q Does that refresh your recollection that
22 Mr. Jones told you that the connection that you had with
23 Dr. Stern weighed in favor of the association between IBM
24 and Satra?

25 A Vaguely. Not entirely, but I'm sure it was.

1 3rgd

Oztemel-cross

2 Q So you will adopt that statement?

3 A I told you that at that time.

4 Q Is it correct, Mr. Oztemel, that you were
5 anxious to have an association with Dr. Stern because it
6 would open the door to companies that might otherwise be
7 closed to you, or not easily accessible?

8 A Well, I don't know if I would put it that way.
9 I was anxious or was happy to have a relationship with
10 Dr. Stern because listening to his qualifications he filled
11 in a vacuum in our company which had to do with highly
12 sophisticated technology.

13 Q Did you in fact use those terms?

14 A I don't recall.

15 Q Let me see if I can refresh your recollection
16 by reading to you at page 355 of the deposition you gave on
17 May 8, 1972, line 7:

18 "Q Did you expect him, referring to
19 Dr. Stern, to contribute any introduction or any of his con-
20 nections?

21 "A Well, that wasn't much of a problem
22 because as Dr. Stern often enough pointed out, we didn't have
23 anybody in the company with his level in that field and once
24 we had somebody like that in our company it naturally opened
25 the door to people with this kind of orientation."

1 Arqd

Oztemel-cross

2 Do you remember giving that testimony?

3 A That's just what I told you again.

4 Q Was it useful to you to have your doors opened
5 to companies that might not otherwise be accessible to you?

6 A We were very happy to get additional clientele.

7 Q So you welcomed the possibility of associating
8 Satra with Dr. Stern; is that correct?

9 A Yes, sir.

10 Q Is it also the fact that you were told by IBM
11 during the course of these discussions and those negotiations
12 you had with IBM that they were considering another trading
13 company, a competitor of yours?

14 A I heard Dr. Stern testify that. I am not sure .
15 I heard that. I am not sure I heard that. Perhaps it was
16 before my joining the meeting, but I have no good recol-
17 lection.

18 Q Is there a company called Savaretti?

19 A There's a gentleman by that name, yes.

20 Q Is that a trading company?

21 A He has a trading company which is called something
22 else, yes, sir.

23 Q Is it a fact that Mr. Stafford told you that he
24 was going to consider either your company as an intermediary
25 or Savaretti as an intermediary?

1 5rqd

2 A I don't recall, but it would make sense.

3 Q It would make sense?

4 A Yes.

5 Q You had that in mind during the course of the
6 time that you were discussing a possible deal with Dr. Stern,
7 wasn't that correct?

8 A No. I said it makes sense in the sense that the
9 company operated by Dr. Savaretti, like ours, is well known
10 in the field of Soviet trade, so I'm not surprised that they
11 would consider one or the other.

12 Q I refer you to your pretrial testimony at page
13 369, the testimony you gave at May 8th.

14 Would you read this paragraph beginning at line
15 7 and continuing through line 21.

16 A Would you like me to read it out loud?

17 Q Read it to yourself.

18 A Yes, sir.

19 Q Do you now recall that Mr. Stafford told you that
20 he was considering between your company and Savaretti?

21 A No, I don't, Mr. Hellerstein, but if it says it,
22 it must have been so.

23 Q This was a period of time before you had an
24 agreement with Dr. Stern; is that correct?

25 A I believe so.

6rqd

Oztemel-cross

1
2 Q You testified on direct examination or in answer
3 to my question -- I think it was direct examination -- that
4 you instructed your personnel not to go near IBM; is that
5 correct, or substantially correct?

6 A Those were not my instructions. I instructed
7 them at Dr. Stern's request not to contact IBM directly
8 unless absolutely necessary and even then by advising
9 Dr. Stern.

10 Q Did this instruction extend to Mr. Giffen?

11 A Yes, sir.

12 Q Was this instruction given to you on August 31
13 or September 1 or around that, the date that you made an
14 agreement with Dr. Stern?

15 A Was the instruction given to me?

16 Q Was the instruction given by you to the
17 personnel at Satra and to Mr. Giffen?

18 A I don't recall the date. It may have been the
19 day before.

20 Q But it was around that time?

21 A It could have been. I don't recall.

22 Q I show you Exhibit MM, the letter of intent by
23 IBM to Satra Corporation. That's addressed, is it not, to
24 Mr. Giffen; is that correct?

25 A That is an IBM letter addressed to Mr. Giffen,

B2

1 7rqd

Oztemel-cross

2 yes, sir.

3 Q And do you know that Mr. Giffen was present at
4 a meeting with Dr. Stern and IBM at around the time this
5 letter of intent was given?

6 A I am aware that Mr. Giffen was present at one
7 or two meetings with Dr. Stern, yes.

8 Q Did he defy your instructions?

9 A No. My instructions were for him not to contact
10 them alone. Specifically for him to be with Dr. Stern
11 during any meeting. So, no.

12 Q During this period of time of August and
13 September when Dr. Stern was active in meetings and discus-
14 sions with IBM, you were also active in meetings and discus-
15 sions with IBM; is that correct?

16 A I would say seldom, a few times.

17 Q You have already identified the meeting of
18 September 3; is that correct?

19 A Yes, sir.

20 Q It is a fact that you were involved in at least
21 one meeting and possibly more in August; is that correct?

22 A I was involved in more than that. I was involved
23 in more than one, perhaps two or three.

24 Q Do you know how many there were?

25 A No.

1 8rqd

Oztemel-cross

2 Q You could have been active in all the meetings;
3 is that correct?

4 A No. I would say that certainly it couldn't have
5 been more than four.

6 Q But certainly you have been involved in some of
7 the meetings?

8 A I was there at some of the meetings, of course.

9 Q And you met Mr. Stafford?

10 A I had met Mr. Stafford, Mr. Hendricks -- I do
11 not know if it was at that time or about that time I met
12 Mr. Jones. I had met Mr. Farr. I had met Mr. Witham.

13 Q Who was it in IBM that confused you and
14 Dr. Stern at one meeting?

15 A Mr. Jones.

16 Q He didn't know which one of the two you were?

17 A No.

18 Q Dr. Stern couldn't have been very influential
19 with IBM if Mr. Jones couldn't recognize you from him.

20 A I hope that's a compliment, but certainly --

21 THE COURT: It seems to me it's an observation.

22 Q You had an opportunity to ask Mr. Witham,
23 Mr. Hendricks, Mr. Jones, Mr. Farr and Mr. Stafford how
24 essential or not Dr. Stern was to the IBM organization, did
25 you not?

1 arqd

Oztemel-cross

2 A Mr. Hellerstein, that would be the most
3 unethical process in our business. When somebody brings you
4 a customer, anybody, to then go to the same customer that he
5 brought you and ask the credentials of the finder, that's
6 unthinkable.

7 Q Is it any more or less ethical to decide that
8 you will not pay any more money to Dr. Stern on the same
9 ground?

10 MR. HILL: I object, your Honor.

11 THE COURT: Sustained.

12 Q Whether ethical or unethical, you certainly had
13 the opportunity to ask them that question; is that correct?

14 A I would say not, because it's unthinkable, as I
15 said. I would not allow anybody in my company to do anything
16 like that.

17 Q Let's leave ethics aside for a moment. The
18 question is whether you had the opportunity to ask him that
19 question.

20 THE COURT: I think you can argue that,
21 Mr. Hellerstein. The witness was physically present and
22 unless he was tongue-tied you could say he was in a situation
23 where he could do so. Is that right?

24 THE WITNESS: That's right, sir.

25 Q Did you ever ask Mr. Stafford whether Dr. Stern

10rqd

Oztemel-cross

was essential to the contract between Satra and IBM?

A I believe you asked me that and I will tell you the same thing. I would not do that.

Q I asked you if you did in fact. Did you do it? Did you ask him?

A No, I would not.

THE COURT: You didn't?

THE WITNESS: No, sir.

Q Take a look again at Exhibit MM.

THE COURT: Off the record.

(Discussion off the record.)

Q Look at the last sentence, "It will also be terminable at any time by us if Mr. Oztemel should cease to be actively engaged in your operations."

THE COURT: I think we ought to explain to the jury we are talking about the letter from IBM to Mr. Giffen about a proposed agreement.

Q Did you ask anyone at Satra or did you ask Dr. Stern or did you ask anyone at IBM why it was that Dr. Stern's name wasn't mentioned here as giving IBM a ground to terminate the contract if Dr. Stern should cease to be actively engaged?

A I knew the answer, Mr. Hellerstein.

Q What was the answer?

1 llrqd

Oztemel-cross

2 A The answer is that with all modesty, there
3 aren't too many people, if any, who are as knowledgeable as
4 I am in this field while there are a few people who know
5 systems analysis.

6 Q There is nothing unique about what Dr. Stern
7 could do?

8 A I hoped it was quite unique, but certainly not
9 irreplaceable. As I said with modesty, I think my position
10 would have been irreplaceable.

11 Q So the fact is that you really believe that
12 Dr. Stern was not the sine qua non of the deal with IBM and
13 Satra, he just helped get the deal for Satra?

14 A No, because that's not what Dr. Stern was
15 telling me.

16 Q Was he replaceable?

17 A I think so, yes.

18 Q You testified on direct examination, if I
19 remember correctly, and you correct me, that at a certain
20 time in reference to the Kama River project you told
21 Dr. Stern that if you would get export licenses you would
22 pay him a certain sum and if you were not able to get export
23 licenses you would pay him a lesser sum; is that correct?

24 A No. I think we were more specific than that.
25 Both Dr. Stern and I knew what we were trying to accomplish.

1 12rqd

Oztemel-cross

2 So while generally we referred to export licenses, Dr. Stern
3 and I knew that we were looking for a specific general
4 export license permission coming from the White House
5 directly which in other terms would have given the government--
6 our government's approval to the Kama River project.

7 Q What was the sum that the -- the upper and lower
8 sum that you were going to pay Dr. Stern?

9 A I believe the lower sum was \$10,000, which
10 included the \$5,000 that was already accrued to him, and the
11 higher sum was \$25,000.

12 Q That higher sum of \$25,000 would be payable if
13 Satra were able to get export licenses with respect to the
14 Kama River project?

15 A If Satra -- again I have to qualify that. If
16 Satra or the Soviet Union got the license to work with the
17 United States for the totality of the Kama River project.

18 Q In November of 1972 is it a fact that licenses
19 were issued?

20 A In November?

21 Q Yes.

22 A There came a time when licenses were not issued,
23 but there came a time when the White House made an announce-
24 ment that they were in favor of the project.

25 Q Did there come a time when the Commerce Department

1 13rqd

Oztemel-cross

2 granted 54 licenses to United States firms to export
3 \$528,000,000 worth of heavy equipment to the Soviet Union?

4 A Yes, I'm sure that time came.

5 Q Did Satra get some of those export licenses for
6 its clients?

7 A Satra in the whole matter got partial licenses
8 and one active license, as I believe I explained during the
9 deposition.

10 Q But it got some export licenses?

11 A Yes, we got some export licenses.

12 Q Did you pay Dr. Stern \$25,000?

13 A That was not the agreement. The agreement was
14 not to get some export licenses.

15 Q How much did Satra have to get?

16 A He had to get the White House approval. When I
17 say he, I don't want to exaggerate, but the White House,
18 with his help, was to give the approval by a certain date
19 to allow American companies to engage in the Kama River
20 project.

21 Q How much in the way of licenses?

22 A How much?

23 Q How much in the way of licenses had to be gotten
24 before Dr. Stern was to be paid \$25,000 by you?

25 A Well, it's unfair to judge the project by the

1 14rgd

Oztemel-cross

2 amount of licenses, but if you want me to --

3 THE COURT: I think, Mr. Oztemel, it's as simple
4 as this. what was your understanding of the arrangement,
5 the conditions under which Dr. Stern was to be paid the
6 \$25,000 and in what respect didn't those conditions come
7 about?

8 MR. HILL: I think that question, your Honor,
9 has been answered at least twice, in my recollection, in the
10 last ten minutes.

11 THE COURT: It has been partly answered, but
12 Mr. Oztemel named one element as time and named another
13 element as not just some licenses. He has left that sort
14 of unclear in my mind.

15 THE WITNESS: I would be glad to clarify it for
16 you, your Honor.

17 The licenses, as we were instructed to apply for
18 them by the Department of Commerce, or the license, was
19 a symbolic one. It did not specify either specific numbers
20 of dollars or precise machinery. It had to have some
21 numbers, but the license was a symbolic license asking for
22 the totality of the project. Now, the totality of the
23 project was estimated to be something like \$3,000,000,000,
24 but this is not what we were asking Dr. Stern to do.

25 Q You said you made a proposal to Dr. Stern that

1 15rgd Oztemel-cross

2 if export licenses in a certain amount that you now say were
3 issued, Dr. Stern would be paid \$25,000?

4 A No, Mr. Hellerstein. I told you that we had a
5 very clear understanding that we were trying to get the
6 White House approval to allow American companies in totality
7 to enter the Kama River project.

8 THE COURT: Were you doing that for American
9 companies at large or just for Mack?

10 THE WITNESS: Mack again was the representative
11 of all American companies because it was impractical for
12 thousands of companies to apply.

13 THE COURT: So to the extent Satra represented
14 Mack, Satra represented all of these companies?

15 THE WITNESS: That's right.

16 Q How much in the way of licenses did you have to
17 get before you were going to pay Dr. Stern \$25,000?

18 A It had to be the totality of the licenses that
19 Mack Truck had applied for.

20 Q All of them?

21 A All of them.

22 Q How much in fact did Satra's clients get in the
23 way of export licenses, over a billion dollars?

24 A No, sir. No, sir. Our clients at the time --
25 only one of the clients, Swindell Dressler got the license

1 16rqd Oztemel-cross

2 for perhaps \$16,000,000, something like that.

3 Q 16,000,000?

4 A I believe so. I'm not sure.

5 Q That wasn't in your mind a sufficient enough
6 amount to pay Dr. Stern \$25,000?

7 A It had nothing to do with the amount, as I told
8 you, Mr. Hellerstein.

9 Q Did you give out this interview on or about
10 November 19, 1971, Mr. Oztemel, as reported in Newsweek?

11 MR. HILL: Do we have an exhibit or something?

12 MR. HELLERSTEIN: I should mark it, you are
13 right.

14 MR. HILL: Does it have a number?

15 MR. HELLERSTEIN: I'm going to give it one.

16 MR. HILL: Isn't it marked?

17 MR. HELLERSTEIN: No.

18 MR. HILL: I thought we premarked all the
19 exhibits in this case.

20 THE COURT: Well, apparently we didn't.

21 MR. HELLERSTEIN: GGGG for identification.

22 MR. HILL: Is it possible to get a copy of this
23 document?

24 MR. HELLERSTEIN: We will read it together.

25 THE COURT: You can get in touch with Newsweek.

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Oztemel-cross

2 MR. HILL: I don't think I have time, your

3 Honor.

4 (Pause.)

5 (Continued on next page.)

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2 THE COURT: The fact that is is marked quadruple
3 G doesn't mean we are going to have to fill in between MM
4 and GGGG, does it?

5 MR. HELLERSTEIN: No, sir, your Honor.

6 Q Did you give this interview, Mr. Ostemel? And
7 I will read from the report:

8 "Ara Oztemel's section manager said his firm is
9 an American trading firm" --

10 MR. HILL: I don't really like to be captious
11 about it, but if he likes to offer it, let him offer it,
12 but it isn't in evidence.

13 MR. HELLERSTEIN: I'll offer it.

14 THE COURT: Why don't you ask him to look at it
15 and say whether or not he gave that interview? If he
16 did, you can put it in evidence.

17 Q Look at the last paragraph and say if you gave
18 that interview in substantially the substance used.

19 THE COURT: I have known some newspaper men to
20 quote people inaccurately.

21 Pause.)

22 A I don't recall, Mr. Hellerstein. But I doubt
23 that I would have called myself a Satra manager.

24 Q Let's look at the numbers here. First, "a
25 license is being issued involving equipment and technical

1 data for the \$1,400,000,000 Kama River truck plant."

2 And then it goes on to say --

3
4 THE COURT: Wait a minute, Mr. Hellerstein.
5 This is the very problem Mr. Hill is trying to avoid,
6 reading a document not in evidence.

7 If you are trying to bring out some information
8 in there, why don't you ask him whether it refreshes his
9 recollection as to the point you are trying to make?

10 Q Does it refresh your recollection that your
11 clients got approximately a half-billion dollars at least
12 of export licenses?

13 A No, sir.

14 Q Does it refresh your recollection as to any
15 amount of export licenses that your clients obtained?

16 A I told you that our clients got a total of maybe
17 16 million and I believe they got it in their own name and
18 not our application.

19 MR. HILL: Your Honor, I am going to object to
20 any further reference to this document because this is just
21 the problem with this kind of a document. Nobody knows
22 who wrote it, and there is nobody here to identify it.
23 And indeed I think Mr. Hellerstein --

24 THE COURT: I will instruct the jury --

25 MR. HILL: There is more to it than that.

3 jgmch

Oztemel-cross

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2 THE COURT: Let me instruct the jury, anyway,
3 that merely asking a question on the basis of a document
4 that Mr. Hellerstein has does not --

5 MR. HILL: Your Honor, may I just go on with the
6 one for just one brief second?

7 It is a fact that produced with this document
8 in the IBM files, as Mr. Fisher has identified, is a covering
9 memorandum which I think, in fairness, in view of Mr.
10 Hellerstein's use of this document, which I consider --

11 THE COURT: Mr. Hill, let me stop you --

12 MR. HILL: -- inappropriate, that he be compelled
13 to read the first paragraph of the memorandum.

14 THE COURT: I won't compell him to read that.
15 I will tell the jury what I understand the law to be with
16 regard to the treatment of matters of this kind, namely,
17 that any document can be put before a witness, regardless
18 of whether it is a part of the document or a full document,
19 and to be asked whether that refreshes his recollection
20 or not. It does or it doesn't.

21 In this case it did not refresh Mr. Oztemel's
22 recollection and, therefore, you are to disregard any of
23 the information which was put into the question.

24 MR. HILL: But, your Honor, I do think, with all
25 due respect to the Court, that he is also entitled to see

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the whole document, that's all.

THE COURT: You can show it to him on redirect, if you want to or if you believe it will help to refresh his recollection.

MR. HILL: I will be seated, your Honor, with only my objection. I consider this an improper cross.

THE COURT: Is it your suggestion that seeing the remainder of the document might refresh Mr. Oztemel's recollection?

MR. HILL: Yes, your Honor, it certainly would, in my judgment.

THE COURT: I am not going to --

MR. HILL: May I show it to your Honor?

THE COURT: No. You can show it to Mr. Hellerstein. If he wants to refresh the witness' recollection and he thinks it will be effective to do so, he can go ahead on it.

And, of course, you are free to use it on redirect.

Q Here is the memorandum that covers it (handing).

THE COURT: All right. Just let him see if it refreshes his recollection, and don't read it to him.

(Pause.)

A Yes.

THE COURT: Does that refresh your recollection,

1
2 I guess the question would be, as to the amount of licenses
3 secured by your clients?

4 THE WITNESS: Your Honor, this refreshes my
5 recollection to the extent that that statement was not
6 made either by myself or any staff member of Satra.

7 THE COURT: That which statement was not made?
8 The statement that is allegedly from the magazine?

9 THE WITNESS: That's right.

10 THE COURT: But does it refresh your recollection
11 as to the amount of licenses received by your clients?

12 THE WITNESS: I find the amounts totally
13 incorrect and not coinciding with any amounts I know on the
14 part of our clients.

15 Q Let me ask you this: There are some companies
16 listed here. I won't read the names, but there are one,
17 two, three, four --

18 MR. HILL: Your Honor, again I must object to
19 this.

20 THE COURT: Don't refer to what is there. Just
21 let him read it and ask him if it refreshes his recollection
22 about whatever question you want to ask.

23 Q Which of these companies in this third paragraph
24 here were your clients in connection with the Kama River
25 project?

1 6 jgmch

Oztemel-cross

2 THE COURT: If any.

3 (Witness indicating.)

4 Q Just IBM?

5 A No, no. Swindell-Dressler Division of Pullman,
6 Inc.

7 Q No others?

8 A As applied to Kama, no others.

9 Q And does this refresh your recollection as to
10 how much in the way of export licenses you received for
11 that company, or that company received?

12 MR. HILL: Your Honor, the witness has testified
13 as to Swindell-Dressler. I don't think it is fair to
14 ask him if it refreshes his recollection.

15 THE COURT: It is fair to ask him, in my opinion,
16 but enough is enough.

17 Let's go on.

18 Q How much?

19 A I believe it was 16 million, but I'm not sure.

20 Q One-six or six-oh?

21 A One-six.

22 Q And apart from the export licenses issued --

23 A Would you excuse me? I would like to clarify this
24 thing in your mind. This was not a license for which we
25 had applied. This was a license which Swindell-Dressler

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2 had applied long before they became our client, and they
3 received it.

4 None of that, you see, is among the group that
5 we had applied for.

6 Q Did you ever disclose to Dr. Stern exactly how
7 much in the way of export licenses you received for your
8 clients, or your clients received in connection with this
9 Kama River Project?

10 A No, sir.

11 Q In your opinion, Mr. Oztemel, does Dr. Stern have
12 an entitlement to the \$25,000 that you promised him if
13 export licenses in some amount were to issue?

14 A In no way.

15 Q At the time you told Dr. Stern that he would
16 receive \$25,000 if, and I quote you your testimony here
17 yesterday, "we are fortunate enough to be successful with
18 these export licenses" --

19 MR. HILL: I'm sorry. I just can't hear you.
20 I'm sorry.

21 Q I will put the question again.

22 At the time you told Dr. Stern that you would
23 pay him \$25,000 if you were fortunate enough to be success-
24 ful in respect of these export licenses, did you have an
25 idea as to how you could define "success"?

1
2 A Yes. Very precisely.

3 Q Please define it for the jury as you understood
4 it then.

5 A We had to receive a symbolic group of licenses
6 for their approval before a certain date which would have
7 made our protocol or agreement between the Russians, Mack
8 Truck and ourselves operative. If the licenses were not
9 received during that date, the protocol was cancelled
10 and the whole project was abandoned as far as we were
11 concerned.

12 Q Did you continue to represent companies that were
13 associated with Mack Truck in that venture?

14 A Associated with Mack Truck? No, sir.

15 Q Is Swindell-Dressler associated with Mack Truck?

16 A We did not continue to represent them.

17 Q Did you continue to represent any companies with
18 respect to the Kama River project?

19 A We represented and still do represent companies
20 that conceivably can some day have a part in Kama River.
21 I can tell you precisely that we do not have a client at
22 the moment, or never had any other than Swindell -- who
23 has been fortunate enough to get a part of the Kama River
24 project.

25 Q When you made this promise to Dr. Stern that we

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2 are talking about, did you tell him what your definition
3 of symbolic would be?

4 A Yes. I didn't have to tell him. He was in the
5 middle of things and often he told me.

6 THE COURT: Would you tell me what "symbolic"
7 means? I don't understand it.

8 THE WITNESS: You see, your Honor, the concept
9 of doing this huge business with the Soviet Union was not
10 decided. The Commerce Department said that this was not
11 their decision and now the decision vested with the White
12 House.

13 THE COURT: Right.

14 THE WITNESS: Nevertheless, there had to be an
15 application on which the White House could have acted.

16 THE COURT: Of course.

17 THE WITNESS: So that documentation with the
18 decision and cooperation of the White House and the
19 Department of Commerce was incorporated in a single
20 license which symbolically took some part of Kama, and
21 applied, the result or the expectancy being that if that
22 was approved --

23 THE COURT: It was symbolic in the sense that it
24 was sort of a test case?

25 THE WITNESS: Test case, yes.

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Oztemei-cross

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THE COURT: All right. Thank you.

Q When you had this conversation with Dr. Stern, it was a fact, was it not, that he had already earned \$5,000?

THE COURT: Had already?

MR. HELLERSTEIN: Earned, yes, sir.

A Yes, having worked two weeks, yes.

Q His rate was \$500 a day, was it not?

A I don't know what his rate is, Mr. Hellerstein. we never quite found ourselves being able to afford that. But we had agreed to \$5,000 for two weeks.

Q Did you testify yesterday, at Page 620, that you knew at the time, or you understood at the time, that his rate was running at \$500 a day?

A I believe I said that Mr. Giffen came to me and expressed concern that the two weeks having been decided for \$5,000, that Dr. Stern would then expect that from then on each day would run at the rate of \$500.

Q So, the answer is you knew that his rate was \$500 a day?

A No, sir.

THE COURT: He knew the mathematics of that situation.

MR. HELLERSTEIN: All right.

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Oztemel-cross

2 Q He had worked for the requisite number of days
3 and was entitled to that \$5,000, was he not?

4 A Yes.

5 Q And this was in May of 1971?

6 A Probably so.

7 Q When was the first time that Dr. Stern was paid
8 anything with respect to his consultation on Kama River?

9 A I think probably on an agreed upon date, the
10 termination, successfully or unsuccessfully, of the
11 period.

12 Q Do you remember the date?

13 A I heard in the testimony that he was paid in
14 August.

15 Q And he was entitled to it in May?

16 MR. HILL: Sorry?

17 Q He was entitled to it in May?

18 A I didn't say that.

19 Q Was he entitled to it in May?

20 A He was entitled if he wanted to take his
21 \$5,000 and go home, but he wanted to stay and work more and
22 perhaps earn \$25,000.

23 Q Are you telling the jury that when Dr. Stern
24 earned \$5,000 that in order for him to get that \$5,000
25 he had to work some more?

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1 A No. He did not have to, but he chose to.

2 Q Did he ask for the \$5,000 at the end of the two
3 weeks?

4 A Not from me and he wouldn't have asked me anyway.
5 He may have asked our accountant.

6 Q Did he ask anyone at Satra?

7 A I wouldn't know.

8 Q Didn't you testify yesterday that there came a
9 time shortly after this two-week period when he came and
10 asked for the money?

11 A I don't believe so.

12 THE COURT: Mr. Hellerstein, I take it you are
13 not finished.

14 MR. HELLERSTEIN: That is true, your Honor.

15 THE COURT: And under the circumstances, I am
16 going to terminate our session for today. If I thought
17 you would finish in five or ten minutes, I would be glad
18 to go along.

19 Ladies and gentlemen, I am sorry we were not
20 able to conclude the case. It is nobody's responsibility.
21 But we will, therefore, have to continue on Monday, and
22 I will see you Monday at 10:00 o'clock and I hope you
23 all have a good week end.

24 (The jury left the courtroom.)
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2 (In the robing room.)

3 THE COURT: I understand that counsel have agreed
4 as to what the issues are relating to damages, but not as
5 to the procedure by which those issues are to be determined.
6 Do you wish to indicate what your understanding is, Mr.
7 Hellerstein?

8 MR. HELLERSTEIN: Mr. Hill thinks that there are
9 fact issues to be developed. We disagree.

10 Our position is this: We believe that there
11 are precise issues on this which we have tabulated and
12 charted. Mr. Hill has a copy of this (handing).

13 MR. HILL: Which I haven't yet read, your Honor.
14 I got it sometime during the course of the afternoon.

15 MR. HELLERSTEIN: I misdelivered it this
16 morning.

17 This chart that I have just given to your Honor
18 we think is suitable either to presentation to a jury or
19 is suitable for use however the Court sees fit if this
20 issue should be tried by the Court.

21 We believe that these issues all ought to be
22 tried at this same time, or if there is any separate hearing
23 involved, it would be a separate hearing that follows
24 very quickly after the trial and is conducted by the Court
25 and not by a magistrate.

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2 THE COURT: I can't do that. I can be perfectly
3 frank. I just can't conduct another separate trial right
4 after it. So I think we had better put everything to the
5 jury.

6 MR. HILL: We object to it, your Honor.

7 THE COURT: I am going to have to figure out
8 whether there are fact questions here or not. If there
9 are any fact question, they are going to the jury. If
10 there are no fact questions, I will decide them as a matter
11 of law.

12 MR. HILL: The pleadings in this case, your
13 Honor, involve a declaratory judgment. The pleadings
14 expressly state, and the plaintiff's complaint says, that
15 you can't determine damages in this case.

16 THE COURT: The complaint says you can't determine
17 damages?

18 MR. HILL: Yes, it says that.

19 THE COURT: Would you show it to me?

20 MR. HILL: If I can just go on, because at least
21 to me, anyway, it seems that wholly apart from the
22 pleadings, one of the real issues on the damage question
23 here is the relationship between the '71 and the '73
24 contract.

25 Now, your Honor will recall that there is no

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2 proof in this case, other than the document itself, with
3 respect to the '73 contract.

4 Now, if we get into a question, it seems to me,
5 of whether or not the '73 contract is a renewal and
6 what the terms -- the words, if you like -- mean in the
7 '73 contract, does, for example, the word "retainer" mean
8 the same thing in the '73 contract that it means in the
9 '71 contract, that is a question of fact, as indeed --

10 THE COURT: I agree with you.

11 MR. HILL: Okay.

12 As is the question of whether it was intended to
13 be a renewal.

14 Now, one of the places that we would have to
15 elicit testimony if that issue were in the case would be
16 from the IBM people who were involved in the negotiation
17 of the '73 contract.

18 THE COURT: Sooner or later we have to face that,
19 don't we?

20 MR. HILL: Yes, your Honor. I understand that.
21 But what I'm saying is that it cannot be in this proceeding.

22 THE COURT: Why not?

23 MR. HILL: Because we have had no discovery of
24 the IBM people; it was not in the case. Indeed, this
25 motion to add references to the '73 contract was made in

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2 this case.

3 THE COURT: That may be another question and then
4 we may have to have another jury for that remaining
5 material.

6 MR. HILL: That's our point, your Honor. Our
7 point is we are perfectly prepared to put to your Honor
8 the question of damages.

9 THE COURT: I will say this, Mr. Hellerstein:
10 While I have granted your motion to add the 1973 agreement
11 to the material, I do think that if the issues that it
12 raises will require testimony from people as to whom it
13 is not unreasonable that discovery has not yet occurred,
14 I don't see how we can try it the day after this is over.

15 MR. HILL: That's all I meant, your Honor, when
16 I said damages weren't in this case if what were meant
17 were the global damages, and when I say "in this case"
18 I mean in this particular proceeding with this particular
19 jury. That's all I meant to say.

20 MR. HELLERSTEIN: If your Honor please, in respect
21 to that issue, we made a motion -- there are two answers
22 I want to give.

23 The first has to do with the timing before trial
24 when all these issues were colated, going back to last
25 summer.

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2 The second has to do with the inadmissibility
3 for legal reasons of the type of testimony Mr. Hill is
4 talking about.

5 Addressing myself to the first question, last
6 summer, when we first got --

7 THE COURT: Let me interrupt, please. I am
8 afraid I am a little tired and maybe a little short-
9 tempered at the end of a week, but I'm not talking about
10 theories and concepts and everything else. I am trying,
11 as a practical matter, to figure out how the hell I am
12 going to decide these issues which you gentlemen have.

13 I'll hear what you have to say and try to think
14 it through over the week end, but it seems to me that
15 it is quite possible that some testimony may be necessary,
16 either before me, and it doesn't really make much
17 difference whether it is before me or a jury, in relation
18 to the 1973 contract and what it means in relation to the
19 earlier contract. I believe I said at the time I granted
20 your motion that it seems to me that at the least you were
21 entitled to put before the jury, or the trier of facts,
22 whether you are entitled to something under the 1973
23 agreement and whether it was a continuation, and so on.

24 So it seems to me at the moment there is
25 really only a question of getting your position as to

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whether or not any further factual questions will remain to be determined after we finish with what we are doing now in order to decide the questions arising under the 1973 agreement.

And if your position is that you don't believe any are, and you are indicating that that is your position, I would like to hear that and ponder that over the week end. Then I'll have to decide which of you I think is correct and where we go from here.

I can only say that it is not, I'm sorry to say, a question of choice. It is a question of whether I conclude that there are factual questions or not. If I conclude there are not any factual questions, then I'll be prepared to decide the questions that are put on my own, if you want me to, I guess that would be it, or put them to the jury in this proceeding.

If I decide, on the other hand, that there are factual questions and the defendants have a right to develop those facts, because although you had the right to supplement the complaint it can't be done at the expense of the defendant, then I'll simply have to put it off to the issues that arise under the December agreement until I can handle it as I would with any other case put before me.

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2 MR. HELLERSTEIN: If your Honor please, this
3 is a very informal memorandum we prepared this morning
4 (handing) concerning the question whether any proof could
5 come in with respect to that 1973 agreement, and we think
6 the answer is that there cannot be any such proof, and
7 I could touch upon these points that I have set out in this
8 memorandum.

9 The first is the question whether the plaintiff
10 would be entitled to any kind of recovery on the income
11 that is set out in that 1973 agreement, and that really
12 is the question whether the agreement is a renewal of
13 the earlier agreement or not, in the very broad sense.

14 Plaintiff's right to compensation under the 1971
15 agreement extended to everything that was earned, all gross
16 revenues earned under that agreement or earned in connection
17 with sales that had negotiations begun during that term
18 or during the renewal of the term of any contract that
19 might be --

20 THE COURT: Exhibit C and D?

21 MR. HELLERSTEIN: Yes, your Honor, any contract
22 that might be made, any contract that might be made
23 between IBM and Satra.

24 When we have this December 1973 agreement coming
25 into play, that agreement began its life before the first

1 20 jgmch

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2 IBM-Satra agreement expired by its terms or even could be
3 inspired by its terms. That agreement of 1971, IBM-Satra
4 agreement had a five-year term. It was terminable after
5 three years if sales did not rise to a certain level,
6 \$50 million.

7 Three years would have been September 1974. So this
8 new IBM contract terminated the old contract and replaced
9 it. So, prima facie, just looking at the contract
10 documents themselves, what we have is a replacement of an
11 existing contract and an extension of its terms.

12 THE COURT: Let me intervene here --

13 MR. HILL: Termination in the new agreement --

14 THE COURT: Let me intervene here just to give
15 you this observation.

16 The difficulty of the situation is not the
17 difficulty with your argument but the difficulty with the
18 situation, as I see is, is that what you are really doing
19 at that moment, and properly so, but perhaps untimely,
20 is to make a motion for partial summary judgment, and I think
21 that may be a very good way to crystallize the decision,
22 but I think you are really saying that as a matter of law
23 you are asking me to rule, are you not, that as a matter
24 of law, the December agreement is something in which the
25 plaintiff is entitled to share?

1 21 jgmch

2 MR. HELLERSTEIN: We think that is a law issue.
3 If your Honor thought it was a fact issue --

4 THE COURT: I don't know yet. I haven't had
5 a chance to study it, but I will say that your position
6 strikes me in effect as moving for partial summary judgment,
7 and I am perfectly willing to grant a motion for summary
8 judgment even if it's orally presented if I am convinced
9 that there are no fact issues. But I am equally reluctant
10 to, and indeed I won't have the right to, if I conclude
11 that there may be fact issues, and I can't conclude that
12 at this moment. I will just have to look over this
13 material over the week end and see what I conclude.

14 But if I do conclude that there are factual
15 issues, I don't know what I could do except to put it down
16 for trial. I will obviously try to put it down sooner than
17 if it were a brand-new case.

18 MR. HELLERSTEIN: Let me address myself to that
19 point as well, just to finish this one off.

20 What we have here is the need for a determination
21 on as full a record as is relevant and appropriate for
22 this situation.

23 THE COURT: Right.

24 MR. HELLERSTEIN: There was testimony during
25 this trial of the introduction of this word "renewal" in

1 22 jgmch

2 Mr. Mott's handwriting and the like, and that would probably
3 be relevant to a disposition of this particular issue.

4 And then there is also the question which has
5 to be a legal question, and it has to be decided at any
6 point in time, whether evidence of the dealings between
7 Satra and IBM or what each of them might have had in
8 mind is or is not relevant and admissible in terms of this
9 case.

10 We take the position that is suggested in the
11 memorandum, that it is not because it is not binding on
12 Dr. Stern. With that statement I move into the
13 other aspect of your Honor's comment in terms of timeliness.

14 We moved last summer, because we had word of a
15 change, to obtain advance copies of this document, to
16 learn about the negotiations and the like, and there was
17 a protective order preventing us from doing anything of
18 the kind, and eventually, after the contract was made --

19 THE COURT: A contested order?

20 MR. HILL: No. It was a consented order, your
21 Honor.

22 MR. HELLERSTEIN: It was a consented order after
23 a motion.

24 THE COURT: I used the word "timely." I
25 didn't mean you had waited too long to raise the issue,

1 23 jgmch

2 although it might have been more convenient if we raised
3 it earlier. What I meant to say was that it's been raised
4 at a time when I'm not sure whether I can accommodate
5 your desires and dispose of everything right off the bat.
6 That's all I meant. I am not saying that you are out of
7 court on pressing the proposition.

8 MR. HELLERSTEIN: I'll tell you what our real
9 problem is, Judge, and it may be the practical putting of
10 the question might resolve it. It would be very wasteful
11 of everybody's energy and time if a new jury had to be
12 convened to deal with all these issues.

13 THE COURT: I agree with you.

14 MR. HILL: We have waived a jury on this point.
15 I don't know why this is even being discussed.

16 MR. FISHER: On our case?

17 THE COURT: No. On the December '73 case.

18 MR. HELLERSTEIN: On this point.

19 What I think --

20 THE COURT: I know what I could do, to tell you
21 the truth.

22 If I should rule that I disagree with you and
23 that they are entitled to put in evidence, is there any
24 reason to believe that it would take longer than a day, if
25 there were not a jury, to hear whatever there was to be

1 24 jgmch

2 heard on the question?

3 MR. HILL: I would certainly think not, your
4 Honor. I mean all we have to do, I would suppose, is go
5 and get the IBM people who were a part of this discussion.
6 I don't know whether they are going to want pretrial
7 discovery on this. If your Honor rules that we are
8 entitled to put evidence in --

9 THE COURT: At the moment, and I am wording it
10 like this, I have some time week after next, and I have
11 plenty of things to do upstairs and I am not anxious to
12 let it be invaded seriously, but if it only took a day
13 or a day and a half, and if both sides were agreeable,
14 that if I conclude, and I have no great desire to conclude
15 one way or the other, that they are entitled to put in
16 evidence, that the evidence would be put before me at that
17 time and I would decide whatever was to be decided on the
18 basis of that, that I can arrange.

19 MR. HILL: It is all right with us.

20 MR. HELLERSTEIN: That means the only issue we
21 leave for this jury, then, if we accept this proposition,
22 is the question of validity and enforceability of the '71
23 contract.

24 MR. HILL: Yes, the contract issues. All the
25 contract issues.

1 25 jgmch

2 MR. HELLERSTEIN: But all these issues about --
3 what about the issue, for example, of incremental annual
4 revenues and expenses or cumulative annual revenues and
5 expenses? I don't want to be sandwiched into a position
6 where the jury gets discharged and your Honor gets a
7 submission and we find out that there is a material
8 question --

9 THE COURT: As to what they decided?

10 MR. HELLERSTEIN: Yes.

11 THE COURT: No. I think it's got to be very
12 clearcut. There is no doubt about that.

13 MR. HELLERSTEIN: It has to be clearcut --

14 THE COURT: I don't see any reason why you cannot
15 between you draw a list of the issues that exist.

16 MR. HILL: We tried to raise the factual questions,
17 your Honor, in the time available to us.

18 THE COURT: Yes, I know.

19 Draw a list of the issues that exist, with an
20 attempt, and I would hope a successful attempt, to determine
21 which ones of those are going to be decided by this jury
22 and which ones are going to be decided by me, and if there
23 is any disagreement, then, I would rule on which ones should
24 be submitted to the jury, but I would make certain that all
25 issues were decided by either the jury or me and that there

1 26 jgmch

2 can be no doubt about what issues were submitted to the
3 jury so that nobody could claim res judicata when they
4 came before me.

5 MR. HILL: That was the purpose, your Honor.

6 I gather we were unsuccessful in the first list of questions
7 that we gave the Court. You know, I'm not arguing --

8 THE COURT: I mean the issue relating to all
9 those questions is did the plaintiff falsely induce the
10 defendant to enter into the contract. That's the issue.
11 There may be 75 misrepresentations, and the reason that
12 I rejected your proposed questions would be because I
13 thought that to put them as they were framed to the jury
14 was unduly prejudicial to the plaintiff. And when I
15 talk about a list of issues, I am not talking about a list
16 of factual questions, I am talking about a list of issues.

17 They were that the jury would be called upon
18 to decide whether or not the defendants were fraudulently
19 induced into entering into the agreement, whether there
20 was a consideration for the agreement --

21 MR. HILL: And whether there was an agreement.

22 THE COURT: -- and whether there was an agreement.

23 And the next proceeding would presumably decide whether
24 or not the plaintiff, if there is a favorable verdict
25 for the plaintiff, is entitled to share in the profits

1 27 jgmch

2 under the December '73 agreement. And I really don't
3 know what else. That would be about it, wouldn't it?

4 And compute whatever damages he is entitled to
5 under that agreement or otherwise.

6 MR. FISHER: As the Court decides they are could
7 be computed, because there is a question of incremental,
8 annual and cumulative annual, and the Court would have
9 to make the factual determination as to how the schedule
10 is to be applied.

11 THE COURT: I think it would be preferable to
12 leave that incremental business for the Court. But I'm
13 not asking to have it up to the Court. In fact, to the con-
14 trary, I would personally prefer to have it decided by the
15 jury.

16 MR. HILL: We think it is a question for your
17 Honor.

18 THE COURT: But I think I probably, after an
19 explanation in more detail as to your respective positions,
20 would be able to understand it better than the average
21 jurymen. I don't know.

22 MR. HELLERSTEIN: I would think so.

23 Could we go off the record?

24 THE COURT: Yes.

25 (Discussion off the record.)

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2 THE COURT: Then let's leave it at this.

3 I believe it is the consensus of all of us that the most
4 acceptable of the unsatisfactory alternatives available
5 to us is to put to the jury for a general verdict the
6 question of whether the plaintiff is entitled to recover
7 against the defendants and the issues on which such a
8 general verdict would turn, and the jury would be instructed
9 to this effect to determine whether the parties entered
10 into an agreement, binding agreement, and whether, if they
11 did, the defendant was induced to do so because of the
12 fraud of the plaintiff.

13 MR.HILL: I think there is also an issue of
14 failure of consideration.

15 THE COURT: And the correlative issue of failure
16 of consideration.

17 If the plaintiff prevails, thereafter the
18 remaining issues, including the rights of the plaintiff,
19 if any, under the December 1973 agreement, would be
20 tried to the Court. Prior to that trial the Court will
21 rule whether he believes the defendant is entitled to
22 introduce any evidence with regard to the question whether
23 the plaintiff is entitled to recover under the December 1973
24 agreement. And, if so, the defendant, or the parties,
25 will be entitled to such discovery as is appropriate.

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2 But every effort will be made to try the case before
3 the Court no later than two weeks from now, that is, during
4 the week of April 19th.

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THE COURT: Gentlemen, is that satisfactory to both sides?

MR. HILL: Yes, it's satisfactory to both sides.

MR. HELLERSTEIN: Yes.

MR. FISHER: Off the record.

(Discussion off the record.)

THE COURT: Let me add, and I assume that nobody questions it, that the Court would determine what damages the plaintiff is entitled to of any type, including but not limited to the December 1973 agreement.

All right, gentlemen. Thank you very much.

MR. HILL: One more thing, your Honor, just for the record. We have a memorandum of law on the mitigation point which we urge on your Honor.

MR. HELLERSTEIN: If for some strange reason there is a retrial of this matter --

THE COURT: You mean if there is a hung jury on the jury question?

MR. HELLERSTEIN: No, I was thinking after we go through the whole process and we're fortunate enough to get some recovery, and they appealed and there was some error, should we be wanting to deal with this same subject --

THE COURT: I would say that the disposition that

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2 we have arranged for the trial of the issues at this
3 time ought not to be binding on the parties in the event
4 of some future requirement for a retrial.

5 MR. HILL: I would suppose a lot would depend
6 if it were sent downstairs and how it came down.

7 THE COURT: Off the record.

8 (Discussion off the record.)

9 (Adjournment taken to 10:00 a.m., Monday,
10 April 3, 1974.)

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Oztemel-cross

2 MARVIN STERN

3 v.

72 Civ. 143

4 SATRA CORP. and SATRA CONSULTANT

5 April 8, 1974
10:00 a.m.

6
7 (Trial resumed.)

8 (In open court; jury present.)

9 A R A O Z T E M E L, resumed.

10 MR. HELLERSTEIN: Good morning, Mr. Oztemel.

11 THE WITNESS: Good morning.

12 CROSS-EXAMINATION CONTINUED

13 BY MR. HELLERSTEIN:

14 Q Mr. Oztemel, on Friday we discussed this
15 exhibit, GGJG for identification. If I remember correctly,
16 of the companies listed in the third paragraph of this
17 you said that the only customer of yours with respect to
18 the Kama River project was Swindell-Dressler Division
19 of Pullman, Inc.?

20 A That's right.

21 Q Is that your testimony?

22 A That's right.

23 Q The other companies were not your customers?

24 A They are our customers, but without hope of
25 participation because of the nature of their goods in the

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Oztemel-cross

7-3

2 Kama River project.

3 THE COURT: I'm sorry, I was distracted.

4 Who did you say was your customer?

5 THE WITNESS: Swindell-Dressler.

6 I said further, your Honor, that there are some
7 other customers, but because of the nature of their products
8 we didn't feel they could have anything to do with the
9 Kama River project.

10 Q So the other companies may be customers but not
11 in relation to the Kama River project?

12 A That's correct.

13 Q Do you remember being asked at your deposition
14 on May 5, 1972, at Pages 251 and 252:

15 "Q Does Satra have any commitments from any
16 companies to receive fees or income in connection with the
17 Kama River project?"

18 And do you remember answering with respect to
19 that question, on 252, Line 14:

20 "A I could tell you the ones I recall; Bendix,
21 Bliss, that's all I can recall, and it's other than
22 Swindell."

23 Do you remember giving that testimony?

24 A I don't, but obviously it's true.

25 Q I observe, Mr. Oztemel, that among the companies

1 3 rgach
2 that you said who were not your customers with respect
3 to Kama River, Bendix and Bliss are both mentioned.

4 Do you see that?

5 A I do.

6 Q Do you wish to change your testimony?

7 A No, Mr. Hellerstein. At this point my statement
8 is true.

9 Q But at that point you had other customers?

10 A At the time you asked me they had possibilities,
11 perhaps, yes.

12 You named them as customers, as clients, did
13 you not, Mr. Oztemel?

14 You answered you had commitments from those
15 companies to receive fees or income in connection with the
16 Kama River project; is that true?

17 A Yes. For instance, Bliss was working on a
18 forging plant for some coins, et cetera.

19 Q You testified at the deposition, did you not,
20 that with respect to Swindell you had two prospects, one
21 for engineering of around 16 million, and the other for
22 the foundry itself, which was about 400 million; is that
23 correct?

24 A I think in the beginning Swindell at least may have
25 had hopes to that extent, yes.

1 4 rgmch

2 Q That was true in the end of 1971, was it not?

3 A I don't know if it was ever true. All I can tell
4 you is that Swindell had hopes of getting the whole foundry
5 project. Eventually, it didn't come anywhere near it.

6 Q You had hopes along with Swindell, is that
7 correct, for yourself?

8 A Well, it doesn't serve any purpose. I would
9 have to tell you now, but that it's neither here or there.

10 Q You testified yes; is that correct?

11 A Well, you are asking me personally, Mr.
12 Hellerstein.

13 At this moment, my recollection is that I did
14 not have great hopes.

15 THE COURT: Are you asking Mr. Oztemel personally,
16 or are you asking him as to whether Satra had hopes, or
17 what is your question?

18 MR. HELLERSTEIN: I don't know, your HONOR.
19 I never knew there was a distinction until now that Mr.
20 Oztemel has made one.

21 THE COURT: Now that you know he made one, which
22 are you asking, or are you asking if either had hopes?

23 MR. HELLERSTEIN: Let me withdraw the question.

24 Q Were you asked the following question and did
25 you give the following answer, at Page 251 of that deposition:

5 rgmch

Oztemel-cross

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2 "Q Does Satra expect to receive any money in con-
3 nection with that project?

4 "A Satra has high hopes."

5 Did you give that answer, Mr. Oztemel?

6 A Obviously.

7 Q Did you distinguish yourself from Satra?

8 A Yes.

9 Q You mean Satra may have high hopes while Mr.
10 Oztemel has low hopes; is that correct? Is that your
11 testimony?

12 A No, Mr. Hellerstein, but as you yourself heard,
13 Mr. Giffen was running the company and he based his goals
14 and objectives and he had my opinions. We were guided
15 by the opinions and objectives of the person who was
16 running it.

17 Q Is that your answer?

18 A Yes, sir.

19 Q Is that your whole answer?

20 A Pardon?

21 Q Is that your whole answer?

22 A As far as your question as I remember it, yes,
23 sir.

24 Q All right. We will leave that subject.

25 When you were meeting IBM in the company of Dr.

1 6 rgmch

2 Stern in August of 1971, did you have the impression
3 that Dr. Stern was meeting the people that you were meeting
4 for the first time?

5 A I believe you asked me that and I told you that
6 I didn't really have an opinion one way or the other, but
7 if you had^d to ask me --

8 Q I am asking you, Mr. Oztemel. That's what I am
9 goind. I am asking you.

10 MR. HILL: Your Honor, I wonder if we could --

11 THE COURT: Mr. Hellerstein, I don't think that's
12 necessary.

13 But, in any event, would you state whether you
14 had any view?

15 THE WITNESS: In especially one case, your
16 Honor. I was about to say, yes, I had the impression since
17 Mr. Jones had confused our personalities, definitely
18 that it was the first time they were meeting.

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Oztemel-cross

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Q Did you meet Mr. Jones in August?

A I can't recall.

Q My question was August 1971 with respect to the IBM people that you met. Can you answer that question?

THE COURT: Did you meet him at all or for the first time, do you mean?

MR. HELLERSTEIN: If your Honor please, I am asking in August of 1971 when he and Dr. Stern had the meeting, whether IBM had the impression that he was meeting these IBM people for the first time.

THE COURT: Other than Mr. Jones?

MR. HELLERSTEIN: Then he answered Mr. Jones and then I just qualified that Mr. Jones wasn't among the group that he met in 1971.

A Would you be kind enough to tell me who we met? I really don't recall who we met.

Q You tell me, Mr. Oztemel. Give me some names that you met in August of 1971 from IBM.

A I would have to guess, Mr. Hellerstein. In August perhaps we met Mr. Stafford. We met Mr. Farr. I don't know if that was August. I met Mr. Hendricks. I don't know whether it was August or if it was with Dr. Stern.

Q Anybody else?

A I met with Mr. Witham, but once again I recall

1 2rgd

2 that when we met Mr. Farr it was because Mr. Witham was not
3 there. I don't know if we met in August or September.

4 Q Is there anybody else from IBM that you remember
5 meeting in August?

6 A Since you told me Mr. Jones was beyond August,
7 no, I don't.

8 Q I am not telling you anything. I am only asking
9 you, Mr. Oztemel.

10 A And I tell you that I don't recall.

11 Q Have we now gotten from you everybody from IBM
12 that you remember meeting before you made the contract with
13 Dr. Stern on August 31 of 1971?

14 A No. I can tell you all the personalities in
15 IBM that I have met.

16 Q With Dr. Stern?

17 A No. I cannot tell you that. I don't recall.
18 I can only tell you who I met of IBM and I cannot tell you
19 whether they were before or after the contract.

20 Q I am only asking for your recollection,
21 Mr. Oztemel.

22 A I do not recall, sir.

23 Q That's all you recall?

24 A That's right.

25 Q With respect to those people that you mentioned,

3rgd

Oztemel-cross

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1 did you have the impression at the time that Dr. Stern was
2 meeting them for the first time?
3

4 A I have no distinct impression in many cases
5 except in the case of Mr. Jones where distinctly it was that
6 they had not known each other before.

7 Q They had not known each other before?

8 A No.

9 Q How about the other people you mentioned,
10 Farr, Witham, Hendricks and Stafford. What was your
11 impression as to whether or not Dr. Stern had known them
12 before? Did you have an impression one way or the other?

13 A At this moment I don't recall that I had an
14 impression one way or the other.

15 Q You testified that you thought Dr. Stern was
16 very influential with IBM. Does that refresh your recol-
17 lection as to whether or not he had known those people or
18 given you the impression of knowing those people before you
19 met?

20 A I testified, Mr. Hellerstein, as to my knowledge
21 of how Dr. Stern was influential and I told you that it was
22 at the very top level.

23 Q You said he knew Ambassador Thompson; is that
24 correct?

25 A Yes, who was a close confidante or friend of

1 4rgd

2 Mr. Watson.

3 Q Wasn't it the testimony that Ambassador
4 Thompson was a consultant to Mr. Jones and not to Mr. Watson?

5 A I don't recall that.

6 Q Let's go back to the people that you named.
7 Was it your impression that Dr. Stern was meeting these
8 people for the first time before you made your agreement with
9 Dr. Stern?

10 MR. HILL: Your Honor, that has got to be at
11 least the sixth time that question has been asked and
12 answered.

13 THE COURT: It's been asked and answered.

14 MR. HELLERSTEIN: I am not getting a complete
15 answer. That's why I am repeating the question.

16 THE COURT: I have in my notes that the witness
17 has no distinct impression whether or not he believed
18 Mr. Stern -- Dr. Stern had met them before or not, with the
19 exception of Mr. Jones, in whose case he had a distinct
20 impression.

21 Was that your answer?

22 THE WITNESS: A distinct impression, yes.

23 Q You had a distinct impression with Mr. Jones
24 that Dr. Stern did not know him and he did not know
25 Dr. Stern?

1 5rgd

Oztemel-cross

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2 A That's right.

3 THE COURT: If you are going to another line of
4 questioning --5 MR. HELLERSTEIN: I have just one more question,
6 sir.

7 THE COURT: All right, fine.

8 Q Did you testify at page 3023 of your pretrial
9 deposition on May 8, 1972, as follows:10 "Q At all the meetings you attended with
11 IBM together with Dr. Stern did you believe that was the
12 first time Dr. Stern was meeting those people?

13 "A Frankly, yes."

14 Is that your testimony, Mr. Oztemel?

15 A That's right; asked in a different way.

16 Q Could you tell me how you distinguished between
17 that question and the one I asked you?18 A You asked me obviously at that time whether I
19 believed that it was the first time. Now you are asking me
20 what was my impression. I believed because Dr. Stern told
21 me in many cases that it was the first time he was meeting.
22 My impression -- I have no distinct impression.

23 Q You distinguish between belief and impression?

24 A Yes, sir.

25 Q All right, I am happy to hear that.

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Oztemel-cross

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2 THE COURT: Mr. Hellerstein, I am sorry to say
3 I have another matter I have got to take care of. It will
4 take five to ten minutes, so whenever you are starting on
5 a new line --

6 MR. HELLERSTEIN: Right now, your Honor.

7 THE COURT: All right. Will the parties in the
8 United States v. Fitzgerald matter please come into the
9 rolling room with the reporter.

10 You can all stay here and I will try and dispose
11 of all this as quickly as possible.

12 (Recess.)

13 THE COURT: Pardon the interruption. We'll have
14 smooth sailing now.

15 Q Mr. Oztemel, I show you Exhibit UUU. Your
16 counsel introduced this at some point during the trial.
17 That was an article about you in Der Spiegel; is that
18 correct?

19 A Yes.

20 Q Is Der Spiegel a prominent German newspaper in
21 Europe?

22 A So I am told, Mr. Hellerstein.

23 Q As you understand -- you are a world traveler.

24 A Yes.

25 THE COURT: I will take judicial notice that it

7rgd

Oztemel-cross

784

1
2 is, yes.

3 Q So all those who regularly read this newspaper
4 and came across this article would know about Satra and
5 about you?

6 A I would assume so, yes.

7 Q I show you Exhibit TTT for identification. Is
8 that an article in Business Week magazine in the issue of
9 June 19, 1971 about you and your company?

10 A Yes.

11 Q In fact, weren't some of your personnel on the
12 cover of Business Week?

13 A That's correct.

14 (Continued on page 785.)
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2 Q And the article goes on and talks about your
3 situation with Mack Trucks and Kama River quite extensively,
4 doesn't it?

5 A Yes, it does.

6 Q And so all those who read that article would
7 know about you and your company?

8 A I would assume so, yes.

9 THE COURT: This is June 1971, did you say?

10 MR. HELLERSTEIN: That's correct, your Honor.

11 Q Now, when you entered your discussions with IBM
12 in August and September of 1971, with Dr. Stern, did you have
13 in your mind that it was likely that one or more of the
14 officials with whom you were discussing had directly or
15 indirectly come across your company in Der Spiegel or
16 Business Week?

17 A I didn't give it much thought. I don't recall
18 that I had any thoughts.

19 Q Whether you gave it much thought or didn't give
20 it much thought, it was clear to you, was it not, that IBM
21 didn't need to get the information about Satra through
22 Dr. Stern, they could have gotten it directly?

23 A I couldn't make that statement. It is possible
24 that if they read it -- as a matter of fact, it turned out
25 that Mr. Stafford had not seen the Business Week, for

1 2jgd

2 instance.

3 Q But he had recognized you from your picture in
4 Der Spiegel, is that correct?

5 A That's correct.

6 Q So it was clear, at least with Mr. Stafford,
7 that he knew you directly and not through Dr. Stern, or
8 knew about you.

9 A Yes.

10 Q And this was before you made your contract with
11 Dr. Stern.

12 A Before we made our contract?

13 Q It is clear you met Mr. Stafford before you
14 made your contract with Dr. Stern, isn't it?

15 A Yes.

16 Q Now, Mr. Giffen testified here, if I recall
17 correctly, and I'll put the question to you, that there
18 were discussions of retainers among the Satra people that
19 would be requested of IBM in the range of \$100,000 to
20 \$500,000 a year. Does that accord with your recollection,
21 Mr. Oztemel?

22 A I think a good deal of the discussions were
23 without me. Those numbers don't seem familiar to me.

24 Q What is your recollection of the retainers that
25 were discussed as a possibility of approaching IBM?

1 3jgd

2 A I think I was pretty much left out of that
3 discussion. I think it was mostly with Mr. Giffen and
4 Dr. Stern.

5 Q I take it that Mr. Giffen or Dr. Stern reported
6 to you from time to time as to what the approach of Satra
7 was to meet IBM.

8 A I think they reported conclusions, which I
9 believe was rather controversial, between Mr. Giffen and
10 Dr. Stern.

11 Q I'm sorry. I didn't hear that.

12 A I said I believe they reported some conclusions
13 after their discussions, and I remember that they each had
14 different views of what to charge and not to charge.

15 Q With respect to the conversations and reports
16 that were made to you, was the subject of retainers discussed
17 at any time?

18 A Yes.

19 Q And was it discussed with you that one
20 possibility might be to ask IBM for sizeable retainers?

21 A Yes, the concept was discussed with me.

22 Q And about when was it discussed? Was it during
23 the course of these discussions with IBM, in August and
24 September of 1971?

25 A I would assume so.

1 4jgd

2 Q Is that the best of your recollection?

3 A That's right.

4 Q I show you Exhibit AA for identification. Is
5 that the form for a consultant's contract that Satra uses?

6 A Yes.

7 Q And was that the form that was given to IBM to
8 be modeled in the final preparation of agreements between
9 IBM and Satra?

10 A I have so understood recently. I understand
11 that it was given by Dr. Stern, yes.

12 Q Was this the form that was generally available
13 for use by Satra in terms of possible deals and negotiations
14 with companies for whom it was to consult?

15 A That is correct, yes.

16 Q Is it clear, Mr. Oztemel, that it is usual
17 practice on the part of Satra Corporation to ask for a
18 retainer as payment for consultation and other advice that
19 Satra extends to its clients?

20 A As far as Satra Consultant Corporation is con-
21 cerned, yes.

22 Q I refer you to page 3 of the form contract,
23 paragraph A, which makes reference to the possibility of
24 semi-annual installments in terms of payments of fixed
25 retainer fees. Is that correct?

1 5jgd

2 A So I see, yes.

3 Q And is that one usual way of being paid a
4 retainer from clients?

5 A I couldn't tell you.

6 Q Would monthly payments also be --

7 A Yes, I believe there are monthly, quarterly,
8 annual, semi. I think there are all those. I don't know
9 which is more predominant.

10 Q Depending on the company that is involved?

11 A That is correct.

12 Q Turning to a different subject, Mr. Oztemel,
13 you testified on direct, and perhaps also on cross-examination,
14 as to the reasons that you told Dr. Stern that you would
15 not make any more payments under the contract, is that
16 correct? You gave some reasons for that?

17 A Yes.

18 Q Was one of the reasons that Mr. Giffen could not
19 get along well with Dr. Stern?

20 A Not that I remember.

21 Q Did you tell IBM that that was the reason?

22 A Not so far as I remember.

23 Q Did you tell IBM that that was an important
24 reason?

25 A I have no such recollection.

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Oztemel-cross

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Q I show you Exhibit AAA for identification, a memorandum from Mr. Hendricks of IBM to Mr. Witham of IBM, subject Satra, dated April 12, 1972. Would you look at that memorandum. Does the fourth paragraph refresh your recollection as to a conversation that you held around the day of that memornadum with Mr. Hendricks?

A No, it does not. I don't recall the conversation, but I see what it says here.

Q You have no recollection one way or another about that conversation, Mr. Oztemel?

A No, sir.

Q You don't deny that conversation, do you?

MR. HILL: Just a minute. I object to that.

THE COURT: Overruled.

Q You don't deny that conversation, do you?

A No. I would take Mr. Hendricks' word that it was discussed but I have no recollection of it, sir.

Q Look at the second paragraph of that memorandum. Does that report matters that you told IBM around that time?

A This one here (indicating)?

Q No. This one (indicating).

A This one. I'm sorry.

(Pause.)

I remember clearly the subject of this conver-

1 7jgd

2 sation.

3 Q How about the third paragraph?

4 A I remember. It is also pertaining to that one,
5 yes.

6 Q We'll skip the paragraph that you don't
7 remember. What about the one after that that makes refer-
8 ence to Mr. Proehl?

9 A That's not clear, either in my mind.

10 Q Did you tell IBM that Mr. Proehl would be
11 primarily involved in the liaison that was necessary
12 between Satra and IBM?

13 A I don't recall making the statement. But it is
14 there and I would not dispute Mr. Hendricks' recollection.

15 Q How about the next paragraph?

16 A I don't remember discussing that one either.

17 Q And the last paragraph?

18 A No, sir. I'm sorry. I have no clear recol-
19 lection of that either.

20 Q Have you looked through this memorandum,
21 Mr. Oztemel, does it refresh your recollection that you
22 told IBM that Mr. Giffen was one of the main reasons for
23 your controversy with Dr. Stern?

24 A No, it does not, sir, no.

25 Q Now, you testified, Mr. Oztemel, if I remember

1 correctly, that you had a conversation with Dr. Stern on
2 August 10, 1971 and as a result of that he wrote up a
3 memorandum and that Exhibit A was that memorandum (handing),
4 is that correct?
5

6 A Yes.

7 Q And you testified that you had a dispute with
8 Dr. Stern, or a series of discussions or negotiations, con-
9 cerning salary and expenses, is that correct?

10 A That's right.

11 Q You didn't mention having any dispute or discus-
12 sion about paragraph 2, (reading) "whatever benefits are
13 derived from these efforts, will be shared equally by the
14 partners"?

15 Did you have any discussion or negotiation about
16 that?

17 A No, we did not. It was clear that we were going
18 to share the efforts and share the benefits.

19 Q And this was because of the concept that you
20 had testified to that you were interested in forming a
21 partnership with Dr. Stern, you to contribute your experi-
22 ence in trade with Far Eastern countries and Dr. Stern to
23 contribute his access to American companies that were
24 technologically oriented?

25 A Not quite so, Mr. Hellerstein. The excess was

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1 good to have. But our problem was that to service these
2 companies you need a very deep and sophisticated technical
3 knowledge. That knowledge did not exist in our company and
4 that was the basis of the partnership.
5

6 Q Why do you need a deep technical knowledge to
7 service such companies?

8 A Because the nature of their work in a given
9 industry is such that you have to have somebody to understand
10 their products and speak the language of the would-be buyers.

11 THE COURT: When you say "technical knowledge,"
12 do you mean technological knowledge?

13 THE WITNESS: Technological. I'm sorry.

14 THE COURT: In other words, related to science
15 or art, whatever it is?

16 THE WITNESS: Technological knowledge, yes.

17 MR. HELLERSTEIN: Would you read back the last
18 few phrases of that answer, please?

19 (Record read.)

20 Q I take it they have such companies generally,
21 lots of people who are successful in selling and who are
22 technologically sophisticated. That's generally correct,
23 is it not?

24 A I didn't get the question.

25 Q I'm asking about the need of Satra for having
somebody with substantial technological capacity.

1
2 A Yes.

3 Q In light of the fact that the companies who are
4 being serviced naturally have plenty of such people, what is
5 the need of Satra to have such people?

6 A Because you are working in a country where the
7 technicians of your client are not familiar with -- the
8 first encounters and the first discussions, the first sales
9 efforts are necessarily on Satra's part. So Satra, or who-
10 ever is there representing Satra in that first effort, must
11 be able to expose the customer to the technology that he is
12 trying to sell and first find out if there is an interest
13 before taking your client's technicians out there.

14 But even through the life of the contract Satra
15 would be responsible for servicing the contract. It is
16 absolutely necessary that our people know what they are
17 talking about.

18 (Continued on page 795.)
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1 1 jgmch

Oztemel-cross

2 Q So from Satra's point of view it is useful to
3 you to have someone in your employ or affiliated with you
4 that understands the companies that you are dealing with.

5 A No, Mr. Hellerstein. To understand a company or
6 the structure of a company -- Borg-Warner is also a very
7 large company and we understand. But we felt adequate
8 to service that one because their products are not that
9 technological.

10 Now, the reason we never went after the highly
11 sophisticated companies is because we didn't have the
12 personnel, and I was happy to find Dr. Stern.

13 Q Because he understood the nature of the services
14 and equipment that IBM sold?

15 A No, because he understood the nature of the
16 highly complicated technological products.

17 Q And he could relate that understanding to other
18 personnel in Satra?

19 A Or to the customer.

20 Q The customer being Russia?

21 A In this case, yes.

22 Q So that was the attraction of Dr. Stern to you,
23 I take it, among other things.

24 A That was the attraction, yes.

25 Q All right.

2 jgmch

Oztemel-cross

Now, did you ever call upon Dr. Stern to have any communications with any officials of the Russian government to tell them what IBM might be capable of selling?

A Well, we were not --

Q Answer yes or no, Mr. Oztemel.

A No.

Q Was it Dr. Stern who brought up the idea of IBM to you?

A Yes.

Q Was it Dr. Stern who introduced IBM to you, to Satra?

A Within the definition of "introduction," it was Dr. Stern -- through him we met IBM executives.

Q That is a pretty good definition. I will take it. Was it Dr. Stern who eventually helped Satra to conclude a deal with IBM?

A On his insistence, he negotiated the whole thing, practically, yes.

Q Answer yes or no, please.

Was it Dr. Stern who helped Satra conclude a deal with IBM?

A He concluded it himself.

Q So the answer is yes?

A Yes.

1 3 jgmch Oztemel-cross

2 Q Did you agree to pay Dr. Stern fifty percent of
3 your income from IBM?

4 A Yes.

5 Q Did you enter into a contract with Dr. Stern,
6 a contract dated August 31st, accepted by him on
7 September 1st?

8 A Again I must qualify it to differentiate a
9 contract and an agreement. I entered into an agreement
10 with Dr. Stern.

11 Q And you understood the agreement was a legally
12 binding one when you entered into it?

13 A Yes.

14 Q The answer is yes?

15 A Yes.

16 Q In your testimony at the trial you referred to
17 Exhibit C. You referred to the document composed of the
18 offer, the irrevocable offer on your part dated August 31st,
19 and the acceptance by Dr. Stern on September 1st as a
20 document, is that correct (handing)?

21 A What is the question again, sir?

22 Q I said you referred to it as a document.

23 A I suppose, yes.

24 Q And you gave this testimony, and I read from
25 Page 684 of the cross-examination in this trial:

864 A

4 jgmch

Oztenel-cross

"No, because the document was not the agreement."

Did you give that testimony?

A Perhaps something like that. I don't know if those are the only words.

MR. HILL: Could we have the rest of that answer read to the witness? Maybe that would be helpful.

MR. HELLERSTEIN: Mr. Hill could read whatever he wants.

THE COURT: If there is any question in the witness' mind as to what he said, he is entitled to see the transcript and agree as to whether or not this is what you asked him.

Would you like to see the transcript?

THE WITNESS: Yes, your Honor.

MR. HILL: May I take it up?

MR. HELLERSTEIN: Yes. 684.

(Pause.)

THE COURT: Does the transcript, as far as you recall, correctly state the question and the answer?

THE WITNESS: The transcript, your Honor, is correct, yes. But it is not as --

THE COURT: That's really all we need to establish. Counsel can read whatever they want from the transcript.

1 5 jgmch Oztemel-cross

2 Q You referred to that as a document and you dis-
3 tinguished it from an agreement. You said the agreement
4 was something else; is that correct?

5 A I said that the agreement had to be much broader
6 because this did not include all our understandings.

7 Q That paper, Exhibit D --

8 A This one?

9 Q -- the irrevocable offer and the acceptance
10 of Dr. Stern, when you signed it and when Dr. Stern delivered
11 it to you, did you consider that a legally binding
12 agreement?

13 MR. HILL: I am going to object, your Honor.
14 I don't know whether that is even relevant, whether he
15 considers it to be legally binding.

16 THE COURT: I think it is relevant, but I think
17 the defendant already earlier answered.

18 According to my notes, he understood at the
19 time it was legally binding.

20 MR. HELLERSTEIN: I just want to make sure that
21 it is still his testimony after he has seen the transcript
22 of what he said before.

23 Q Is it still your testimony, Mr. Oztemel?

24 A I made the offer; it was accepted. I considered
25 it binding, Mr. Hellerstein, yes.

1 6 jgmch

Oztemel-cross

2 Q And was that legally binding agreement, as you
3 understood it, subject to a more formal written contract?

4 A Again, formal, I don't know. But it was certainly
5 subject to a contract which included all the provisions
6 which Dr. Stern and I clearly understood.

7 Q So your testimony is that that contract was
8 subject to something else, meaning that it depended on some-
9 thing else before it became legally binding? Is that your
10 testimony?

11 A I would not venture to define the legalities
12 there, Mr. Hellerstein, except that --

13 Q I'm asking about your understanding.

14 MR. HILL: Let him finish.

15 THE COURT: Yes, Mr. Hellerstein.

16 Sustained.

17 Q I am asking about your understanding, Mr. Oztemel.

18 A My understanding was that we had the essence of
19 an agreement. My further understanding was that we were
20 then to draft another contract incorporating and including
21 all the other many things that Dr. Stern and I understood,
22 but because of time could not be incorporated into this
23 short agreement.

24 Q The question, Mr. Oztemel, is whether that piece
25 of paper, Exhibit D, the irrevocable offer and Dr. Stern's

1 7 jgmch

2 acceptance, depended on anything else in your mind
3 before it became a legally binding obligation of Satra
4 Corporation as you understood it at the time.

5 A Again, I would have to leave out "legally,"
6 Mr. Hellerstein, because that is not my profession or
7 business.

8 Q Let's leave out "legally"; a binding agreement.

9 Did you understand it to have depended on anything
10 else to be a binding agreement at the time?

11 A With the assumption that we both had that there
12 would be nothing that was the subject of disagreement in
13 the overall, yes, it was binding.

14 Q So the answer to the question is that when you
15 received Dr. Stern's acceptance on September 1st, you
16 considered that a binding agreement on Satra Corporation,
17 not subject to anything else?

18 A I considered it, Mr. Hellerstein, a binding
19 agreement on both sides, with all the verbal commitments
20 made on both sides which did not appear here, so
21 to that extent, yes.

22 Q Oh, you are introducing other elements.

23 I want to be clear. Did you consider that
24 document, when Dr. Stern delivered his acceptance on
25 September 1st, a binding agreement on Satra Corporation not

1 subject to anything else? Yes or no?

2 MR. HILL: I object, your Honor. That question
3 has been asked and answered again at least a half-dozen
4 times.
5

6 THE COURT: I think it has been answered. But
7 it is a subject of importance which the jury should
8 understand clearly. I'll allow the answer to this
9 question and then I'll sustain the objection to further
10 questions on the subject.

11 I know what you want, Mr. Hellerstein, but I think
12 you have gotten reasonably good answers and I'll allow
13 just one more.

14 MR. HELLERSTEIN: Could the witness be asked
15 to answer yes or no, if he can?

16 THE COURT: No, I won't direct him to answer yes
17 or no.

18 Mr. Greenberg, will you read back the last
19 question, please?

20 (Question read.)

21 THE COURT: Let me modify it.

22 I will ask you to answer yes or no and then, if
23 you wish to make an explanation after answering yes or no,
24 you may do so.

25 A In answer to yes or no, my answer is no. My

1 9 jgmch Oztemel-cross
2 answer is no because I considered it a binding agreement
3 not only on Satra but also with Dr. Stern to go ahead and
4 draft another document incorporating the totality of our
5 agreements.

6 Q Do you recall having been asked the following
7 question and giving the following answer on May 4, 1972
8 in your pretrial depositions, Page 157, Line 4:

9 "Q Is that spelled out in your agreement with
10 Dr. Stern that it was subject to a more formal written
11 contract?

12 "A No."

13 Did you give that testimony?

14 A If it's there, I must have, although it surprised
15 me. I must have not understood your question.

16 Q You have drawn a blank. You don't remember it.
17 Or do you remember it?

18 A I didn't say that. I just don't recall. It has
19 been months, almost a year.

20 THE COURT: I take it the reference there was
21 to Plaintiff's Exhibits C and D, what we are calling
22 Plaintiff's Exhibits C and D?

23 MR. HELLERSTEIN: Yes, your Honor.

24 Q When did you sign this transcript?

25 MR. HILL: Excuse me, Mr. Hellerstein. Could I

1 10 jgmch Oztemel-cross

2 ask you to give me the page and the line?

3 MR. HELLERSTEIN: 157, Line 4.

4 MR. HILL: You didn't read the next two questions
5 and answers.

6 MR. HELLERSTEIN: No. I just read the first one.
7 I'll read another one in a minute.

8 Q When did you sign this transcript, Mr. Oztemel?

9 A I believe about three weeks ago.

10 Q Three weeks ago.

11 Were your answers truthful when you read it three
12 weeks ago?

13 A Frankly, Mr. Hellerstein, I was just leaving. I
14 never had a chance to read it, I regret to say, so I
15 couldn't tell you.

16 Q Did you swear to the truth of the answers you
17 gave in the deposition before a notary public?

18 A I think that's the procedure, yes, sir.

19 Q And you did?

20 A Yes.

21 Q So you swore to the truth.

22 Did you give the following answer to the following
23 question immediately following, on Page 157:

24 "Q Did you tell him that this agreement was not
25 binding until you got a formal contract?

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Oztemel-cross

2 "A No. But there was a discussion at some time
3 that a formal contract would be drafted."

4 Did you give that testimony?

5 A That's still my understanding.

6 Q But there was no question in your mind at the
7 time that Exhibit D was a binding agreement on Satra
8 Corporation not subject to any thing else?

9 A I will repeat, Mr. Hellerstein, I considered it
10 a binding agreement for both sides, both Satra Corporation
11 and Dr. Stern.

12 MR. HELLERSTEIN: I have no further questions.

13 MR. HILL: I have no questions.

14 THE COURT: Thank you, Mr. Oztemel.

15 (Witness excused.)
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THE COURT: Mr. Hill, you are still at bat.

MR. HILL: We have nothing further, your Honor.

THE COURT: The defense rests?

MR. HILL: The defense rests.

THE COURT: Ladies and gentlemen, I want to discuss the legal posture of the case with the attorneys, so will you please make yourselves comfortable in the jury room.

(The jury left the courtroom.)

THE COURT: Mr. Hellerstein, do you have motions to address to the Court?

MR. HELLERSTEIN: Yes, your Honor.

Would your Honor give me just a moment?

THE COURT: Surely.

(Pause.)

MR. HELLERSTEIN: If your Honor please, I would like on behalf of the plaintiff to move to strike the affirmative defenses and counterclaims alleged in the answer and for a directed verdict under Rules 41(c) and 50 of the Federal Rules of Civil Procedure on the ground of insufficiency of law and failure of proof. I needn't recount the evidence because I think your Honor has a fine grasp of it. I just want to say a word about one particular small point -- sub-point of the overall motion.



1 3 rgmch

2 The only issue with respect to the affirmative
3 defenses that is in the case, assuming that there is
4 sufficiency of proof, is the defense that Dr. Stern
5 misrepresented and to plead that same defense in a different
6 verbiage seems to me to be confusing and prejudicial
7 and I can't see any need for having this separate first
8 affirmative defense. So that is the sub-point under the
9 heading of the overall motion.

10 As I said before, I think it doesn't need any
11 argument with respect to the total insufficiency because
12 your Honor has heard the proof in this trial.

13 THE COURT: Do you wish to say anything, Mr.
14 Hill?

15 MR. HILL: I am going to ask Mr. Simon to address
16 himself to that, along with our own motion for a directed
17 verdict.

18 THE COURT: All right.

19 MR. SIMON: If the Court please, I am not really
20 sure I followed all of Mr. Hellerstein's argument. It is
21 not before me in written form and I would tell the Court
22 that I did not pay that much attention to it, but what it
23 appears to me to be stating is that there was a duplicity
24 in submission, perhaps based upon the pleadings, between
25 a misrepresentation and failure of consideration, and I

1 4 rgmch

2 think the analogy is fairly easy to see, if the Court would
3 let me indulge for a moment in a sporting analogy.

4 If I were approached on the street and someone
5 told me that he knew that Black Widow would win the fifth
6 tomorrow at Aqueduct, and that he knew it because he had
7 a special prescience or particular study and what-not;
8 he had definite information indicating that to be true, and
9 if in fact Black Widow did not win the fifth at Aqueduct,
10 if we are still at Aqueduct, I think that is both a mis-
11 representation and a failure of consideration, the mis-
12 representation being in the failure of prescience and the
13 failure of consideration being, in legal terms, the failure
14 to deliver a benefit or a detriment. It is rather
15 clear in the law the party has nothing to do with the
16 conferring of the benefit if it is simply fortuitous as
17 to him. While there may be consideration, it is not con-
18 sideration of any promise made to him. I think that it's
19 easy to see, your Honor, that that is a sufficient response
20 to support that particular portion.

21 If we may, your HONor, we will go forward and make
22 the motion for a directed verdict under Rule 50 on behalf
23 of the defendants. In this connection, your HONor, we will
24 raise again the same point which we raised at the close of
25 the plaintiff's case, with perhaps a bit of a preface before

1 5 rgmch

2 we get into some particular points of the testimony that
3 should be called to your Honor's attention. It is, indeed,
4 all very well for Dr. Stern to state that it would serve
5 the ends of justice to liberate a very substantial sum of
6 money from Mr. Oztemel and give it to him. That, of course,
7 is his position that he is entitled to more than a finders
8 fee which was offered to him on repeated occasions. He
9 makes that contention based upon three specific factual
10 obligations. Going to the agreement, in this agreement
11 there is included as factors for consideration of the
12 Court the income, the expenses, and whatever services
13 were to be performed in order to earn the income.

14 It is Dr. Stern's construction, interpretation --
15 indeed, it is his whole case, that he must be considered
16 to prevail on all issues.

17 Number One, he is entitled to fifty percent of
18 income, so he says;

19 Number Two, he was not required to perform any
20 services whoatsoever; and

21 Number Three, he is not to be burdened with any
22 of the expenses.

23 That is his lawsuit.

24 When we made our remarks at the close of the
25 plaintiff's evidence, your Honor made two rather pertinent

1 6 rgmch

2 points clear, the first being, well, was there materiality
3 in the question of whether the expenses were in fact to
4 be charged to Dr. Stern. I would submit to your Honor
5 at this point that the issue of materiality is no longer in
6 issue at all. It is obvious that it was a material factor.
7 They disagreed about it constantly. Dr. Stern bridled
8 about it on September 3rd. Indeed, the expenses have
9 been almost equal to the revenue, so from every conceivable
10 standpoint, the treatment of the expenses was a material
11 factor, is a material factor, really is the most important
12 factor at bar between these parties.

13 Now, for Dr. Stern to prevail on this rather
14 rigid construction -- and again, your Honor, if I might be
15 indulged, your Honor said at the time of our original
16 motion, "Maybe it's Dr. Stern's position that there was
17 to be a later agreement to cover these expenses. Maybe
18 the agreement of these parties was simply incomplete,
19 not divided, not in disagreement, but incomplete as to the
20 expenses."

21 I would submit now, your Honor, under the state
22 of the record, that's not a sustainable position. It is
23 Dr. Stern's position that the agreement was complete, there
24 was to be no further agreement, and he is right about it.

25 Now, your Honor, that brings us directly to the

1 6a rgmch

2 issue which is the only way Dr. Stern can prevail, of
3 whether the parties had an agreement that he, Dr. Ste n,
4 was not to be charged with the expenses, despite the
5 clear language in the agreement which states, "All
6 expenses for the project advanced by Satra are to be
7 recouped out of earnings."
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2 Now, Dr. Stern, from the standpoint of a motion
3 for a directed verdict, is the only witness to be considered,
4 I think, by your Honor. Dr. Stern's position on that has
5 been very clear to me. It's been clear to me throughout,
6 what his exact position on that subject is. Beginning on
7 page 92 of the transcript of this trial, Dr. Stern stated
8 very clearly that he had a meeting on August 31 with
9 Mr. Mott and Mr. Hermann and that they argued; they wrangled
10 over the issue of whether he was to be charged with these
11 expenses. Your Honor, there are several pages of testimony
12 on the subject. It is absolutely clear under this testi-
13 mony, just absolutely clear, that Dr. Stern finally said,
14 beginning now on page 89 at line 18 of the transcript,
15 Dr. Stern's words on direct were -- not cross, just his own
16 lawyer talking:

17 "Q What happened next in the discussion?"

18 These are Dr. Stern's words:

19 "All right. I then said -- I understand what
20 you are talking about, telling Mott and Hermann. I see
21 what you are trying to tell me that you want to charge me
22 with these expenses. I have an agreement with Ara Oztemel.
23 I am not going to agree to anything. I will be seeing him
24 later on in the day. Let me think about this. I will dis-
25 cuss it with him."

1 2rgd

2 The parties absolutely had balked on the meeting
3 of those terms; and whether these expenses were cumulative
4 or not and the extent he would be charged them.

5 Now, it is equally clear from Dr. Stern's
6 testimony that he had no binding agreement as of that time
7 and that his agreement was made with Oztemel late in the
8 afternoon, as I recall, on August 31. Now, the significant
9 portion of that, your Honor -- sometimes I have been told
10 it's unfair, but I am going to read what your Honor asked
11 the witness while the witness was on the stand because you
12 got to the thing very quickly and I think correctly.

13 The Court said on page 331, line 13:

14 "Wait a minute, Doctor. Don't get so excited.
15 I also understood that on September 3, or whatever day it
16 was that you met with Mr. Mott to go over this proposed
17 document, Exhibit Z, you did talk about the expense reimburse-
18 ment there because you told him you disagreed with the
19 proposal."

20 The witness said, "That's correct."

21 The Court said, "In addition to that, as
22 Mr. Hill has just brought out, you and Mr. Mott and others
23 also discussed the question of expense reimbursement on
24 August 31, and in particular the schedule which was attached,"
25 going back again to the meeting with Mott and Hermann on the

1 3rgd

2 31st.

3 The witness said, "We discussed it on the
4 morning of the 31st applicable to the earlier agreement."

5 Then, your Honor, comes the crux of the whole
6 lawsuit. The witness continues at line 4, page 332:

7 "It happens they added it to the August 31
8 agreement. There was no discussion at the time of them
9 having added it to the August 31 agreement. I merely
10 accepted it as it was."

11 Your Honor, that's not a comment. That's not
12 a comment. It is perfectly obvious that there were a
13 constant series of arguments about it. It is perfectly
14 obvious that it was a considerable factor. It is perfectly
15 obvious that Mott insisted it was cumulative and Stern
16 insisted it was not. It is the plaintiff's testimony that
17 when the agreement was signed it was added to by Satra at
18 Satra's request in a form that had been prepared and
19 bargained over by Mott and he submitted it the way it was.

20 We submit, your Honor, that it is not a surprise.

21 THE COURT: Gentlemen, as you may already be
22 advised, your comments were both interesting and very
23 enlightening. I think there are serious questions of fact
24 and they must go to the jury. Both motions are denied.
25 I will reserve decision, however, on Mr. Hellerstein's

1 4rgd

2 motion with regard to whether the first affirmative defense
3 should be stricken and I will, of course, give you plenty
4 of advance advice as to what my position is, or at least
5 adequate advance advice.

6 Mr. Hellerstein, are you going to put any
7 further proof in?

8 MR. HELLERSTEIN: The only thing I would like
9 to do, your Honor, is we made a copy of that blackboard
10 chart. I suspect -- we marked it for identification. I
11 suspect it should probably be in evidence.

12 THE COURT: You mean the copy?

13 MR. HELLERSTEIN: Yes. I would like to move
14 that copy into evidence. It is EEEE, your Honor.

15 MR. HILL: No objection.

16 THE COURT: All right, Plaintiff's Exhibit EEEE
17 is received in evidence.

18 (Plaintiff's Exhibit EEEE was received in
19 evidence.)

20 MR. HELLERSTEIN: The plaintiff rests.

21 THE COURT: Off the record for a moment.

22 (Discussion off the record.)

23 THE COURT: I intend to tell the jury that the
24 only issue before them will be whether or not the plaintiff
25 and the defendant entered into a valid contract and whether,

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2 if they did, that contract was induced by the plaintiff's
3 misrepresentation and fraud. Those, as I see it, are the
4 only two issues at this time for the jury. Obviously
5 there are a great many instructions that have to be given
6 to them in regard to those issues, but those are the issues.

7 All right. Could you call in the jury now,
8 please.

9 (Jury present.)

10 THE COURT: Ladies and gentlemen, we have come
11 to the conclusion of the presentation of evidence. The
12 only thing I want to report to you is that during your
13 absence, the parties, by agreement, introduced into
14 evidence one further exhibit, which is simply a copy of the
15 chart that Dr. Stern drew for you on the blackboard so that
16 you can look at it if you wish to during your deliberations.

17 Now, you will remember that I told you at the
18 beginning of the case that after all the evidence had been
19 submitted Mr. Hellerstein and Mr. Hill would sum up for you;
20 that is, they would wrap up their view of the case in a
21 narrative form to you, and after that I will instruct you as
22 to the law to be applied in this case and then you will
23 deliberate on the case.

24 Unfortunately I have not had a chance to complete
25 the preparation of my charge and perhaps counsel want a

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AFTERNOON SESSION

(2:15 p.m.)

(In the robing room.)

THE COURT: I called you in to give you my rulings.

I am denying the plaintiff's motion to strike the first affirmative defense. I don't expect to make a big thing of it in my charge, but I think you are free to argue it to the jury, and I do have something about it in my charge.

Now, on the requests to charge, it is difficult for me to be entirely accurate about my rulings here because there is an awful lot of overlapping between you, understandably, and I am not quite sure without taking a long time to pore over precisely which version I used in each instance. But I have tried to indicate where I have approved things in principle, or where I know that I've adopted something I'll try to tell you, and where I have rejected it, I'll certainly tell you.

I have adopted the plaintiff's revised contentions of the parties, except that I have inserted a fairly lengthy statement of the contentions of the defendants, which I believe Mr. Hill will find accurate, to balance out the contentions given by Mr. Hellerstein.

2jgd

I have adopted the principle relating to burden of proof stated in plaintiff's requests to charge, that is, that the plaintiff has the burden of proving by a preponderance of the evidence and the defendant has to prove by clear and convincing evidence that there is fraud, etc.

Now referring to Item No. III, the first item having to do with the irrelevance, let's call it, of hopeful puffing and so forth, I have stated in one of the instructions I've given that they must find there was a misrepresentation of fact and not merely of opinion or prediction.

I have adopted the list of elements set forth by the plaintiff in the middle of page 6. I have then gone on on the whole to utilize the statements, somewhat modified, of the defendants as to the detail of such elements, and I will comment more on that when I get to referring to the defendants' requests to charge.

I grant No. IV in principle.

On V through the bottom of page 8, I have not adopted the language at the bottom of page 8, but I have adopted the language at the top of page 9.

On the supplemental requests to charge, I am granting all of them.

Now we come to defendants' requests.

1 3jgd

2 Starting with the original requests, Request
3 No. 1 is granted.

4 Request No. 2 is granted in principle. I do
5 charge the jury that they must find that Dr. Stern did what
6 he said he would do or, putting it another way, that you
7 got what you bargained for.

8 No. 3 is granted in principle.

9 No. 4 is granted in principle, but, as I've
10 indicated, I've used the plaintiff's list instead of your
11 list.

12 No. 5 is granted in edited form.

13 The same is true of 6 and 7.

14 No. 8 is granted in principle.

15 No. 9 is granted in principle.

16 No. 10 is not applicable any longer because
17 you've indicated, the plaintiff indicated they are not
18 raising the question whether the actions of the defendants
19 were taken within a reasonable time.

20 I find No. 11 not to be applicable because I do
21 not find sufficient evidence in the record to support the
22 implication or suggestion that if Dr. Stern made a mis-
23 representation it was made innocently, so to speak, or
24 without intent to deceive.

25 I believe that he has been directly charged with,

1 4jgd

2 and that all I should charge the jury is that he has been
3 directly charged with, intending to deceive, and I decline
4 to charge No. 11.

5 MR. HILL: May we have an exception to that,
6 your Honor?

7 THE COURT: Of course.

8 I believe the rest are not applicable. Well,
9 No. 12 refers to damages.

10 MR. HILL: Right, right.

11 THE COURT: And the remainder refer to
12 Mr. Stafford.

13 MR. HILL: Right.

14 THE COURT: Now, with regard to your supplemental
15 requests, No. 1 is granted in principle, but I revised it
16 to be considerably shorter.

17 No. 2 is granted in principle, and I also
18 revised that to be considerably shorter.

19 I reworded No. 3, but it is granted in principle.

20 I think that takes care of it, gentlemen. I
21 hope that I have accurately stated the situation. But, of
22 course, you can always ask me to clarify it after my charge,
23 if that seems necessary.

24 I am ready to go, if you are. But let me ask
25 you this:

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2 Mr. Hellerstein, are you still proposing that
3 this sheet should be given to the jury (indicating)?

4 MR. HELLERSTEIN: No.

5 THE COURT: All right. Very good.

6 MR. HILL: I wonder if it would be appropriate
7 for me to ask whether it is your Honor's intention to charge
8 and give this thing to the jury today?

9 THE COURT: I do hope to do so, because I have
10 a meeting at 9:30 tomorrow morning and a hearing at 10:00.
11 I don't, on the other hand, expect, for a case like this,
12 however important it may seem to other people, to stick
13 around here after hours. I would bring the jury back in
14 the morning to sit.

15 We'll play it by ear, but I hope to be able to
16 charge today.

17 MR. HILL: Mr. Simon just asked me about the
18 issues that go to the jury. I take it the issues that go
19 to the jury are, one, is there an agreement, a contract?
20 two, was it fraudulently induced and was there a failure of
21 consideration.

22 THE COURT: That's right, but I am not going to
23 put special questions to them.

24 MR. HILL: No.

25 THE COURT: Those are the issues that I will

1 6jgd

2 tell them are in the case.

3 (In open court, jury present.)

4 THE COURT: Ladies and gentlemen, the floor is
5 about to be given to counsel to address you. I just want to
6 remind you that, as I told you at the outset of the case,
7 whatever Mr. Hill or Mr. Hellerstein have to say about the
8 case, and I have no reason to believe they won't be accurate,
9 their statements do not constitute evidence. You've heard
10 all the evidence now.

11 The purpose of their statements is to give you
12 their point of view so you can put everything in perspective
13 and, when the time comes, decide the case for yourselves.

14 Mr. Hill.

15 MR. HILL: Your Honor, ladies and gentlemen,
16 this has been kind of a long week and I'm sure that you are
17 as glad as we are that it has finally reached this point,
18 where we will put to you the questions which we think have
19 been raised in this matter.

20 I just want to take this opportunity to thank
21 you for your attention. It is not easy in these courtrooms
22 to stay awake. With all due respect to the federal court-
23 house, the facilities are something less than adequate for
24 people to try to pay attention, which I know you all have
25 tried to do.



1 4 jgmch

2 money would have been paid under the 1971 agreement.

3 There were additional payments under agreement, and this
4 is also referred to in that same exhibit, under a 1973
5 contract, and even that sum of money comes to an additional
6 \$180,000.

7 Now this, ladies and gentlemen, is made in the
8 context -- and this really brings me to what at least
9 we consider to be -- when I say "we," what the defendants
10 consider to be one, really two, although there are three
11 issues -- but certainly one of the two key issues in the
12 case: Was there an agreement on August 31, 1971?

13 Now, that issue really turns on a factual
14 question, and that factual question is: Had Satra, acting
15 through Mr. Oztemel, Mr. Mott, Mr. Hermann, those are all
16 names that you remember, reached an agreement on the
17 expenses that were going to be charged against Dr.
18 Stern's -- or I should say, the expenses to be charged
19 against the monies received from IBM before Dr. Stern got
20 to share fifty-fifty? You will all remember this testimony,
21 but I want to go back to it.

22 It is our position, and I think his Honor will
23 charge, that unless the parties had reached full and total
24 agreement on the subject of how the expenses were to be
25 charged under the August 31st agreement, in other words,

1 5 jgmch

2 unless Dr. Stern and Satra acting through its people had
3 reached total agreement with respect to how those
4 expenses were to be shared, there simply was no agreement.

5 Now, I don't ask you to recollect any testimony
6 other than that given by Dr. Stern on this issue. Mr.
7 Mott and Mr. Oztemel were perfectly clear when they said
8 there was no agreement. Now, they are interested parties;
9 we recognize that. I don't suggest for a minute that you
10 do anything other than believe them. But I recognize that
11 they are interested parties and you can resolve this
12 question, this factual question. for yourselves based
13 solely on Dr. Stern's testimony.

14 Why can you do it? How can you do it? There
15 are two separate place in the record. One of them runs
16 from about Page 80 through Page 95, and then there is
17 another section at Page 330, 331, where this very issue
18 is raised in the testimony, and it is perfectly clear that
19 what Dr. Stern testified to is true.

20 And what did he testify to? You may recall that
21 he testified that on the 31st he had a discussion with
22 Mott and with Hermann, the lawyer and the accountant for
23 Satra. They told him that it was their understanding
24 that these expenses were to be cumulative, that they were to
25 be accumulated through the period of the contract, and when

1 6 jgmch

2 revenues were realized, the cumulative expenses were to
3 be charged.

4 Dr. Stern took the position with them at this time,
5 as he has done in this courtroom, that, no, that wasn't
6 the way the agreement was to be done, that he was only to be
7 charged expenses on the schedule if there were revenues
8 realized in that year, and as you pass out of a year
9 in which no revenues have been realized, then the expenses
10 for that year were to be ignored, wholly apart from the
11 reasonableness of that kind of agreement, and he went on
12 to say that the meeting with Mott and Hermann was
13 adjourned without an agreement having been reached, that
14 he had a further discussion with Oztemel that afternoon,
15 the subject was not discussed, and his very testimony is that
16 they, referring presumably to Mott, Hermann and/or
17 Oztemel, had added the schedule to the agreement without his
18 having agreed with them as to what it meant.

19 Now, if you believe Dr. Stern and his testimony
20 on this issue, I would urge you that there simply cannot
21 be an agreement. Certainly, nothing could have been more
22 material than this question of the expenses. You heard
23 Mr. Oztemel testify to the effect that, in the course of
24 conversations with his people, where they were trying to
25 estimate what it was going to cost to service an agreement

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2 with IBM, that in their own conversations they said,
3 "Look, IBM is of the size it is." I'm sure I don't have to
4 tell you how big IBM is, "when IBM starts to send people
5 into Russia," and you remember the listing of the various
6 exhibits of the things that Satra was supposed to do,
7 it becomes very clear that, again viewing this from the
8 standpoint of reasonableness, that when Mr. Oztemel testified
9 to the effect that their estimate was a hundred thousand
10 dollars a year, that that was a reasonable estimate of the
11 expenses, and indeed that's what shows in the schedule
12 attached to what in this case is the famous Plaintiff's
13 Exhibit C, called the proposal letter.

14 Now, Dr. Stern has testified, notwithstanding
15 all of this, he had an agreement, that the parties had a
16 meeting of the minds. What, what is the history of this
17 Stern-Satra relationship? It has been testified to at
18 great length. The August 13th document, the August 25th
19 document, the August 31st document, followed by the
20 September 3rd document, as to which there has been much
21 testimony, followed by a contract prepared a draft of a
22 contract prepared by Dr. Stern's lawyer, Mrs. Hauser.

23 The history of this relationship was one of
24 proposal and counterproposal. I think that that's what comes
25 out of all of this testimony. Certainly, it is clear that

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2 even Dr. Stern, although there has been some testimony
3 from him on the issue, never himself thought he had an
4 agreement prior to August 31st, and you may remember his
5 deposition testimony in that regard.

6 This was a constant process of back and forth
7 and back and forth, and I think that given the testimony
8 as to what happened on the 31st, then the testimony of
9 Mr. Mott as to what happened on September 3rd when he
10 prepared that next draft, the exhibit number of which I have
11 now forgotten, you may recall there was testimony from Dr.
12 Stern that this represented renegotiation of the agreement.
13 It cannot be renegotiation of the August 31st agreement,
14 we submit, if it is a fact that on August 31st the parties
15 had not come to a complete understanding with respect to what
16 was to be done with these expenses and how they were to
17 be charged.

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2 Again, the September 3rd contract is simply
3 a natural result, if you like, of the continuing discussions
4 between these parties, between the Satra people, various
5 of the Satra people, and Dr. Stern, and it cannot be, I think,
6 in any reasonable way, considered to be renegotiation.

7 Indeed, you might ask yourself this question:
8 If Dr. Stern was as exercised, was as mad, if you like,
9 at Mr. Mott, as he tells us -- you may recall his testimony
10 that he suggested to Mr. Mott that he was renegotiating,
11 that he had no right to do this, and that he was, as I
12 say, mad about it, and that Mott's reaction was to,
13 I think, "charge out of the room without saying anything."
14 there is no testimony in this record that on
15 September 3rd, or at any time, until a much later period
16 of time -- I believe it's late October or November --
17 did Dr. Stern ever raise the question with Mr. Oztemel.

18 Now, I put it to you, ladies and gentlemen:
19 Is it reasonable if what you thought you had on August 31st
20 was a contract in which you had a possibility of receiving
21 millions of dollars and you had been told by company
22 counsel, the company's lawyer, that the agreement wasn't
23 what you thought it was, would you have waited, would
24 anyone have waited for two months before going to the boss,
25 Oztemel? I submit to you that Dr. Stern didn't think he

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2 had an agreement at all on September 3rd, or otherwise
3 he would have acted differently than he had.

4 Now, again, I think you must ask yourself this
5 qu-stion, again trying to determine whether there was
6 an agreement here, again: Is it reasonable? There has
7 been much testimony in this record about a partnership,
8 fifty percent and so on and so on and so on. Whatever that
9 was, and it is whichever you believe.

10 Let's again go back to the question of expenses.
11 Is it reasonable to believe that, faced with the prospects
12 of millions of dollars of profits of income, that Satra
13 would have agreed, or indeed I will put it to you another
14 way: That Dr. Stern wouldn't even have proposed
15 that he, in effect, get fifty percent off the top, because
16 that's really what he is talking about; he is talking about
17 fifty percent off the top.

18 Now, reasonable, experienced business people just
19 don't make those kinds of commitments, and indeed the
20 testimony here is that Satra didn't make that kind of
21 commitment, and on Dr. Stern's own testimony they didn't
22 make that kind of a commitment, because he said there
23 was not an agreement on this issue.

24 Now, I suggest to you that there is no partner-
25 ship indeed that provides that one partner gets fifty

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2 percent of the gross, pays none of the expenses, and the other
3 partner gets fifty percent of the gross but he bears
4 all the expenses, whatever they may be.

5 I suppose the issue here is not whether you think
6 it's fair or unfair. The issue on this particular point is
7 whether or not there was, in fact, an agreement. I
8 submit to you the undisputed testimony of Dr. Stern
9 himself; ignore if you like, Mr. Mott's testimony,
10 Mr. Oztemel's testimony. There was simply no agreement
11 that gives rise to any rights on the part of Mr. Stern.

12 Let me turn now to the second major issue in the
13 case. This is a somewhat more complex issue and it
14 requires reference to, I think, something more of the
15 record than really the -- I guess it isn't more than ten
16 or fifteen pages that I refer to out of a record which now
17 must run close to a thousand typed pages.

18 The defendants took the position at the outset of
19 this trial that Dr. Stern was able to get Mr. Oztemel
20 to sign the document dated August 31st because Oztemel
21 and his people at that point in time believed that Stern
22 was able to bring to Satra IBM as a client. Now, you are
23 going to have to determine, if, but only if, you decide
24 that there was an agreement between the parties -- you
25 will only get to this question in your deliberations if you



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MARVIN STERN

v.

72 Civ. 143

SATRA CORP. and SATRA CONSULTANT

April 9, 1974
9:45 a.m.

(Trial resumed, in the robing room.)

THE COURT: The Court has suggested that we proceed without the alternate juror, who is the only person missing, since he will be dropped from the proceedings immediately after the reading of the charge, and I understand counsel have no objection to my doing so.

MR. HILL: No objection.

MR. HELLERSTEIN: No objection.

(In open court; jury present.)

en v. Satral
Div. 143
'74
er, J.

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CHARGE OF THE COURT

THE COURT: Good morning, ladies and gentlemen of the jury. My remarks are addressed solely to you this morning, and I hope you will give me solid attention, I am sure you will, because you have got all the facts now, but the question is what rules do you apply in order to determine whether or not this case should be decided in favor of Dr. Stern or of Satra Company.

You are about to undertake your final function as jurors, and that is to decide the fact issues. You are the sole and exclusive judges of the facts. You pass on the weight of the evidence, you determine the credibility of the witnesses, you resolve whatever conflicts you believe there are in the evidence, and you draw such reasonable inferences as may be warranted by the testimony.

By the way, ladies and gentlemen, I am going to interrupt myself to say that it has become the custom, in a court like this anyway, because of the importance of the cases here, among other reasons, for the judges to prepare their charges in writing, and it is for that reason that I am reading my charge, although I would much prefer to converse with you directly, as I am doing at the moment.

If, as the result of reading the charge, I go too fast, which I sometimes have a tendency to do, or for any

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reason you can't understand what I'm saying, would you please raise your hand and I'll be glad to slow down or elucidate.

My function at this stage of the trial is to instruct you as to the law, and it is your duty to accept these instructions as to the law and to apply them to the facts as you find them. In your determination of the facts you rely upon your own recollection of the evidence. Anything that counsel may have said as to a fact during the course of the trial or in his summation, or indeed anything the Court, that is, I, may have said or may refer to in these instructions as to a fact is not to be taken in substitution of your own independent recollection of the evidence.

Now, to wrap the situation up for you, I'm going to state what I understand to be the contentions, or the positions, of the two parties here. I hope this will help to put things in perspective, but I want you to understand I am not sponsoring these contentions. I am just repeating to you what I understand the parties to argue.

Dr. Stern has brought this action for a declaratory judgment. He asks this Court to declare that he has a valid and binding agreement with defendant Satra Corporation and Satra Consultant Corporation, and that the defendant

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should be directed to abide by the agreement and to pay the plaintiff all monies due and coming under the agreement.

Let me interrupt myself to say that although Dr. Stern is asking that the defendants be directed to pay to him all monies due to him, you are not being asked and will not be asked to determine what the sums due him are but only the question of whether he has a valid, binding contract, and hereafter we will determine, if your decision is that he does, how much is owed to him.

Dr. Stern contends that prior to September 1, 1971 he introduced defendant Satra Corporation to IBM World Trade Corporation and arranged various meetings between Satra and IBM to discuss the hiring of Satra to act as IBM's consultant with respect to engaging in business in the Soviet Union.

He further contends that during the course of discussions between IBM and Satra, and on September 1, 1971, he and Satra entered into a written agreement whereby he was to receive fifty percent of the revenue which might be received in the future by the defendant Satra from IBM; that Plaintiff's Exhibit C in evidence is a copy of the written proposal offered by Satra to plaintiff and that Plaintiff's Exhibit D in evidence is a copy of Dr. Stern's acceptance of Satra's proposal, and that Plaintiff's

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2 Exhibit E in evidence is a guarantee of that agreement
3 by the defendant Satra Consultant Corporation.

4 Dr. Stern further contends that after the dis-
5 cussion of his agreement with Satra on September 1, 1971,
6 he assisted in negotiating with IBM and helped obtain
7 for Satra, on September 22, 1971, written agreements
8 between IBM and Satra, which agreements have been
9 marked Plaintiff's Exhibits H, I and K in evidence; that
10 the agreements with IBM provided for payment to Satra
11 of a consulting fee based on 3-1/2 percent of all data
12 processing equipment and 7-1/2 percent of all office
13 equipment sold by IBM in or to the Soviet Union over a
14 five-year period; that in accordance with the agreements
15 between IBM and Satra, or or about October 12, 1971 IBM
16 paid to Satra an initial advance of \$25,000 and that Satra
17 in turn paid the plaintiff fifty percent thereof, or
18 \$12,500, in accordance with the terms of the agreement
19 between plaintiff and Satra; that thereafter, in November
20 1971, Satra demanded that unless Dr. Stern renegotiated
21 his contract and accept less than was due him under the
22 contract Satra would not consider its contract with him
23 binding and no further payments would be made to him, Dr.
24 Stern argues; that on December 22, 1971 IBM paid to Satra
25 another \$25,000 advance and Satra refused to pay to Dr.

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2 Stern fifty percent of that advance.

3 Dr. Stern argues that Satra admits that it entered
4 into the agreement with plaintiff, with him, that is, by
5 signing Exhibit C in evidence, and that Dr. Stern introduced
6 Satra to IBM to help negotiate the contract with IBM,
7 obtained IBM's signature on the contract between IBM and
8 Satra, and is entitled to compensation for his services.

9 Now I have finished describing Dr. Stern's
10 contentions and I am coming to Satra's contentions.

11 Satra - and I call both corporations Satra,
12 Satra Corporation and Satra Consultant, because for all
13 practical purposes they are one here - Satra, as you
14 know, views the matter quite differently. Satra puts forth
15 several reasons why it believes Dr. Stern is not entitled
16 to recover on the contracts. The first is that no contract
17 ever existed between it and Dr. Stern because, Satra
18 contends, there was never a meeting of the minds between
19 Satra and Dr. Stern as to precisely what their agreement
20 was.

21 The second contention of Satra is that even if you
22 find that Plaintiff's Exhibit C and Plaintiff's Exhibit D
23 did constitute a valid and binding contract, Dr. Stern is
24 nevertheless not entitled to recover because, says Satra,
25 he brought about the agreement between himself and Satra

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by what Satra claims was misrepresentation or fraud.

Specifically, Satra claims that Dr. Stern held himself out as having special influence and special expertise, without which Satra could not secure a contract with IBM, whereas in fact, as Satra contends, Dr. Stern had no special influence or expertise whatever to enable him to bring about an IBM agreement. Indeed, Satra argues that its contract with IBM was not brought to fruition because of anything that Dr. Stern did and therefore, as a subordinate and third argument, Satra claims that it did not get what it bargained for and under all the circumstances it has the right to rescind, or break, the contract with Dr. Stern even if you find that that contract was originally valid and binding.

I am coming now to tell you who has the burden, or responsibility, of proving the various things that we are talking about. The plaintiff has the burden, or responsibility, of proving by a preponderance of the evidence that an agreement was entered into between himself and Satra in the form set forth in Plaintiff's Exhibits C and D. By now I'm sure you know they are the documents of August 31st and September 1st.

Let me explain to you the phrase "a preponderance of evidence." It means simply that the evidence on this

1 issue must be more convincing or persuasive to you than
2 the evidence opposed to it. In other words, for Dr.
3 Stern to establish that the contract was valid and binding
4 he must present to you evidence which you believe is more
5 persuasive than the evidence on the other side.
6

7 What I've told you so far relates to the proof
8 of the contract itself. On the other hand, as to Satra's
9 claim that Dr. Stern fraudulently induced it to enter into
10 the contract, in order to prevail Satra must prove that
11 point to your satisfaction by clear and convincing evidence.

12 If you find that Dr. Stern has proven by a
13 preponderance of the evidence that there was a valid contract
14 between himself and Satra, then in order to defeat Dr.
15 Stern's claim the essential elements which must all be
16 proven by clear and convincing evidence by Satra are
17 as follows; in other words, in order for Satra to knock
18 the contract out of the box, if you find that there was a
19 good contract, Satra must prove all of the following items
20 by clear and convincing evidence. They are:

21 First, that Dr. Stern made representations to
22 Satra of facts and that the facts were not merely his
23 opinions or expectations;

24 Second, that such representations of facts were
25 not true;

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2 Third, that Dr. Stern knew that they were false,
3 or not true;

4 Fourth, that the representations which he
5 made which were untrue were what we call material, and
6 I'll explain to you in a moment what that means;

7 And, finally, fifth, that Satra relied on the
8 representations and entered into the agreement with Dr.
9 Stern in the light of it and because of it. I will
10 now discuss each of these elements.

11 A misrepresentation is a communication by words or
12 other conduct by one person to another that under the
13 circumstances amounts to an assertion not in accordance
14 with the facts. For example, if you find that Dr. Stern
15 said he had influence with IBM and he did not, you may find
16 that he made a misrepresentation. Or, if you find that
17 Dr. Stern said the relationship between him and Satra was
18 essential to Satra's being able to get IBM as its client,
19 and that was not true, you may find that Dr. Stern made a
20 misrepresentation. Of course, as I have said, you must
21 find not only that such representations were not true but
22 that Dr. Stern knew they were not true.

23 Now, there has been conflicting testimony as to
24 exactly what statements Dr. Stern made to the Satra
25 personnel. In determining what statements were in fact made

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by Dr. Stern, you may, and you should consider all the circumstances leading up to and surrounding the exchange of memoranda between Satra and Dr. Stern August 31st and September 1st, respectively, including whether in your judgment Satra would have entered into the agreement in question if Dr. Stern had not in fact made the statements which you find that he did make.

Next. Even if you decide that Dr. Stern made one or more misrepresentations, you must still decide whether they were of a material fact or facts. A material fact is a fact to which an average, reasonable, prudent person would attach importance in determining a course of conduct to be taken or followed upon learning that fact.

Therefore, if you find that he made such a statement and that an average man would pay attention to it and regard it as important, then you would find that that was a misrepresentation of a material fact. On the other hand, if you find that an average man would not attach importance to whatever statements you find Dr. Stern to have made, then the statement would not be material and you would decide in Dr. Stern's favor on that issue.

The next question you must decide is whether, if you find that Dr. Stern did make misrepresentations of material facts, he made them intending to deceive Satra.

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1 If you find that Dr. Stern made a material misrepresentation
2 knowing that the statement he made was false, you would
3 find that he intended to deceive Satra. Furthermore, even
4 if you were to find that Dr. Stern made the misrepresentation
5 without knowing whether it was true or false but pretending
6 that he had exact knowledge of the situation when he did
7 not, you can find that he intended to deceive Satra.

8
9 The next question you must decide concerns the
10 element of reliance. To allow Satra to rescind, or break
11 its agreement, with Dr. Stern, you must find that the
12 false representations complained of were relied upon by
13 Satra when it executed its memorandum of August 31, 1971
14 and forwarded it to Dr. Stern. Putting it in other words,
15 you must decide whether Dr. Stern's false representations
16 induced Satra to enter into the agreement with Dr. Stern.
17 You do not have to find that the misrepresentations were
18 the only inducing cause of the agreement being entered
19 into. It would be sufficient if such misrepresentations
20 were an inducing cause and Satra relied on it.

21 In determining the question whether Dr. Stern
22 made a material misrepresentation on which Satra relied,
23 I want to point out to you that a person to whom a
24 statement is made is justified in relying on its truth
25 although he might have learned it was false if he had made

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his own investigation of the facts. There is no automatic requirement in law that a party investigating verify statements which the other party to the contract had made in the course of their dealing.

However, in an arm's length transaction the allegedly defrauded party must exercise ordinary care for the protection of his own interests and is charged with knowledge of all facts which would have been uncovered by a reasonably prudent person similarly situated.

Now, finally, you must decide in this case whether Dr. Stern did what he promised to do, or, put another way, whether Satra got what it bargained for under the agreement. If Dr. Stern did not do what he promised to do so that Satra did not get what it bargained for, then Satra would have no further obligations to Dr. Stern and you should find in its favor.

Now, I believe I've given you all of the special rules of law which apply to this case, but there are certain general rules that I want to go over with you. I want to advise you that both parties are entitled, of course, to the same fair trial at your hands. I bring this up only because one of the parties is an individual and one of the parties is a corporation. And lest any member of the jury should think that there is any basis for distinguishing

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2 between them, I wish to tell you immediately that there
3 is not. The law does not distinguish between parties on
4 the basis of whether one is an individual and another
5 a corporation. All parties, including corporations, stand
6 equal before the law and are to be dealt with equally.

7 Coming to another subject, there is no dispute
8 that the contract between the plaintiff and Satra was
9 prepared by Satra, that is, the August 31st proposal was,
10 and Dr. Stern's acceptance of September 1st was merely
11 an acceptance.

12 The law requires that an agreement be interpreted
13 strictly against the party who drafted it. Accordingly,
14 if you should find that any provision of the contract is
15 ambiguous, and I'm not suggesting that you will find that,
16 but if you should, the ambiguity should be resolved against
17 the party which drafted it, that is, against Satra.

18 Now, a jury cannot make a new contract for the
19 parties, and you are not being asked to and you may not make
20 a new contract for the parties. You must construe the
21 agreement as made. This is because the parties make their
22 own bargains and are required to be held to the terms of
23 their own agreement.

24 The first inquiry, therefore, is what did the
25 parties intend? If their intent is sufficiently shown by

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the language employed, it is the jury's duty to enforce the contract. The law, of course, presumes that the parties understood the meaning of their contract and that they had the intention to do what they said. But although the law does presume that the parties understood the meaning of the contract, if there was no meeting of the minds then there was no agreement.

In this connection I point out to you that Satra claims that there was no meeting of the minds as to the operation of the expense schedule attached to Exhibit C. If you find that the expense schedule was a material part of the agreement and that the parties did not have a meeting of the minds as to the operation of the expense schedule, then you should find that there was no contract between them and you would find in favor of Satra.

When I say a material part of the contract, I mean one which was central to and a significantly important part of the contract.

Finally, I instruct you that if a party is entitled to rescind the contract - in other words, if you find that Satra should be entitled to rescind the contract - because of the misrepresentations of the other party, its right to rescind is not barred because it

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may have obtained certain benefits under the contract.

In other words, if you should find that Satra is entitled to rescission here, its right would not be barred merely because it cannot return to Dr. Stern the labor and services that he has already performed, so long as you find that he has received the reasonable value of those services. But, and on the other hand, a party to a contract cannot rescind the contract when it has accepted the benefits thereunder without reasonably compensating the other party.

Now finally, ladies and gentlemen, I want to give you some instructions which I hope will help you in judging the credibility, or believability, of the witnesses. Your determination of the issues must be made on the totality of the evidence, and this depends in large measure upon how you appraise the testimony of the witnesses.

How do you determine the facts and appraise the credibility of a witness? Well, there is no magic formula, but in your search for the truth you use your fund of experience or common sense. You have seen the witnesses on the stand and you have observed their manner of giving testimony. How did they impress you? Did a witness give you the appearance of telling a forthright

2 and truthful story?

3 In substance, what you really do is to size up
4 the person and act accordingly. In everyday life you are
5 often called upon to judge the dependability of the
6 statement made to you by other people and you do it by
7 determining how it fits in with everything else you have
8 heard, how sensible it appears to be, whether there is any
9 motive by a person to tell something other than the truth,
10 whether the person appears to be a dependable person
11 otherwise.

12 You obviously take into account the interest of
13 a witness. The plaintiff, Dr. Stern, is an interested
14 witness, and so in my opinion is Mr. Oztemel. They
15 are the principals here. But you may also find that other
16 witnesses for Satra are interested in the outcome of this
17 case because of their present or past association with
18 Satra and the connections that they had with the transactions
19 at the time that they occurred.

20 An interested witness is not necessarily unworthy
21 of belief, of course. His interest is merely a factor
22 which you may, and in my opinion should consider in
23 determining the weight and credibility to be given to his
24 testimony. Just as you may take any factor into consideration
25 which appeals to you in aiding you to decide whether or not

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2 one is telling the truth which commends itself to your
3 belief or which you may find corroborated by other
4 independent evidence.

5 Now, ladies and gentlemen, under your oath you
6 were sworn to try this case in accordance with the law
7 and the evidence and to render a true verdict accordingly.
8 Each juror is entitled to his or her own opinion, but you
9 are required to exchange views with your fellow jurors.
10 That is the very purpose of jury deliberation. That's
11 what it is all about. Although in order to reach a verdict
12 either for the plaintiff or for the defendant your
13 verdict must be, as I believe you know, unanimous.

14 If you have a point of view and if after reasoning
15 with other jurors it appears that your judgment is open
16 to question, then, of course, you should have no hesitation
17 in yielding your point of view, if you are convinced that
18 the opposite point of view is really the one that satisfies
19 your own judgment and common sense. However, you should
20 not give up a point of view that you conscientiously believe
21 in simply because you are outnumbered or outweighed.

22 Now, ladies and gentlemen, during the course of
23 your deliberations, if at any time you wish to receive
24 the exhibits or any of them, or you wish to have any of
25 the testimony of a witness read back to you, or you have

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2 any questions to put to the Court, your foreman should
3 only knock on the door and the marshal who is standing
4 outside the door will convey that message to the Court and
5 we'll arrange for whatever you wish.

6 I am going to ask Juror No. 1, Mr. Taylor, to act
7 as your foreman. Mr. Green, the alternate, had not arrived
8 for this morning's proceedings, but if he had, although
9 he would have been entitled to sit and listen to my charge,
10 he would not be entitled to deliberate with you and I
11 would have to discharge him with thanks at this time.

12 Ladies and gentlemen, I have come to the end of
13 my instructions to you. I am going to take a moment or
14 two with the attorneys in the robing room to see if
15 they believe any points require clarification, which I
16 hope they will not, and we will return to you momentarily.

17 JUROR NO. 5: Do we have an opportunity to ask
18 questions at the time of the jury charge?

19 THE COURT: Yes, I think you should so we under-
20 stand whether there are any sources of confusion in your
21 mind.

22 JUROR NO. 5: I have several things which are
23 pertinent exclusively to your charge rather than the
24 testimony.

25 THE COURT: All right.

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2 JUROR NO. 5: One was, in your charge you say that
3 there is agreement among the parties as to who drafted
4 the agreement of August 31st, namely, Satra. And my
5 impression was that certain points of that were intentional
6 and there was some allegation that, for example, the
7 word "incremental" was inserted in the agreement by Dr.
8 Stern and certain other aspects of the agreement.

9 Could you clarify that?

10 THE COURT: I'll clarify that after I have con-
11 ferred with counsel.

12 JUROR NO. 5: Another thing that I am a little
13 confused on is this: In terms of misrepresenting the
14 facts as opposed to misrepresenting opinion, if I allege
15 that this bannister is over six feet tall, I am misrepre-
16 senting a fact. If I allege that it is the best bannister
17 I have ever seen, is that misrepresenting a fact or an
18 opinion or --

19 THE COURT: I don't think that it would be
20 proper for me to try and specify for you an example there.
21 I have tried to give you the rule of law. We can't always
22 make a compartment watertight and you'll have to use your
23 judgment as to whether, in case you find there was any
24 misrepresentation, it was a misrepresentation of fact or
25 whether you believe that Dr. Stern was merely expressing an

opinion.

I believe that you understand, ladies and gentlemen, because this subject seems to me to be very close to lay experience, or ordinary experience, the difference between deliberately telling somebody an untruth or merely expressing an opinion which you don't believe - how can I put it? - in which there is no deliberate intention to misrepresent.

JUROR NO. 5: The last thing that I want to hear you on is the issue of -- you said on the one hand we should interpret against the drafting party, and yet on the other hand there is this matter of what constitutes a meeting of the minds.

And my problem with this issue is that I'm uncertain from your charge as to whether -- well, to me these two requests that have been made of us are in a sense contraposed because if the answer to my first question is that it is acknowledged that Satra drafted the document and therefore we must interpret it, any ambiguity against them, then it would seem to me that they can't argue that there was not a meeting of the minds if we are -- in other words, there is a difficulty. If we are going to interpret against them, we can't then say that there was no meeting of the minds.

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THE COURT: I don't think that necessarily follows, sir. But you people will have to decide that. I just want to be sure that you understand what the rules are and then you can apply them as you believe they should be applied to the facts.

First, and I haven't said there are any ambiguities, I am sure you understand that, in the agreement. But if you should find that a sentence could mean more than one thing, and if you find that it is a portion of the agreement about which there is no dispute that it was drafted by one party, then the rule of law is that the meaning that is favorable to the non-drafting party is the one that you would adopt.

It is also true, as a rule of law, that parties do not have a contract unless they have a meeting of the minds, and you will have to decide, when you come to that point, if you do come to that point, how you bridge the gap.

All right, gentlemen, I'll see you in the robing room.

(In the robing room.)

THE COURT: Mr. Hellerstein?

MR. HELLERSTEIN: Your Honor, you gave two illustrations of what might be considered as misrepresentations.

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2 One illustration had to do with something about Dr.
3 Stern being able to influence IBM. The second one was
4 an illustration regarding the essentiality of Dr. Stern
5 to Satra if Satra and IBM would have a contract.

6 I would request that your Honor charge the jury
7 to find that these could be opinions as well as facts and
8 that the very statement of this could be interpreted in
9 another way.

10 Number one, a man if he says he has influence may
11 in his own mind think that he has someone in his pocket
12 or he can say that my powers of persuasion --

13 THE COURT: I am agreeable to telling the jury
14 that they have the right to find that that was an opinion.

15 MR. HELLERSTEIN: All right. That will be as to
16 both illustrations?

17 THE COURT: Yes.

18 MR. HELLERSTEIN: The second point I want to
19 raise had to do with that portion of the charge which made
20 reference to the expense schedule and allowing the jury to
21 find that if it was a material element and there was no
22 agreement that there would be no contract, no valid contract.

23 My point is this, your Honor: that I think that
24 even if the jury found there was no agreement on that
25 precise point that there nevertheless could be a contract

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2 and the law would give the Court the power to put in something
3 that was equivalent. The expense schedule had to do with
4 a certain aspect of expenses, and there are other ways
5 of treating that particular problem.

6 The central point I am trying to get to is that
7 the parties can have a partnership and certain detail in
8 the treatment of expenses could be unclear, yet there still
9 would be an agreement.

10 THE COURT: Even if that is true, and I'm not
11 going to try to decide it at the moment, the question is how
12 to isolate that situation so the Court is in a position
13 to do anything about it at a later time. I don't see how
14 you can do anything about it except to ask for a special
15 verdict on that particular point. Do you?

16 MR. HELLERSTEIN: No. But perhaps -- no, I
17 don't.

18 THE COURT: I mean, if you want to propose something
19 along those lines, I am willing to entertain it.

20 MR. HELLERSTEIN: No. I would prefer not to.

21 THE COURT: All right.

22 MR. HELLERSTEIN: The third point had to do with
23 your instruction on the right to rescind if a party obtains
24 some benefits under a contract.

25 I think the rule I would request would be that if

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2 a party obtained substantially the benefits bargained
3 for, he cannot rescind.

4 THE COURT: I decline to charge to that effect
5 not because I think it is necessarily wrong, but because I
6 have correctly charged already, and I have said, for
7 example, that if Dr. Stern didn't do what he was supposed
8 to do or if Satra didn't get what it bargained for, it
9 could rescind, the implication clearly being that if it did
10 get what it bargained for - I didn't say that affirmatively -
11 it could not rescind, and I don't think the word "substantial"
12 adds anything that would justify my going into the subject
13 again.

14 MR. HELLERSTEIN: The last point had to do with
15 the principle of waiver. The testimony showed that Mr.
16 Oztemel was in a position to know the facts in early
17 September and did not do anything about it, and I would
18 regard that as a waiver of any right to rescind.

19 THE COURT: Well, that seems to me a matter of
20 law for me to determine on the basis of the record.

21 MR. HILL: There is a stipulation, I think, your
22 Honor. Do you remember when there was some colloquy at
23 the side bar?

24 THE COURT: There was a question whether it
25 was a timely action.

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2 MR. HILL: That's right.

3 MR. HELLERSTEIN: The stipulation had to do with
4 the timeliness after Mr. Stafford told him.

5 MR. HILL: Oh, no.

6 THE COURT: I think they are overlapping questions
7 but different questions. The stipulation had to do with
8 the acquiescence by the plaintiff in the proposition
9 that his firing was timely. Am I correct?

10 MR. HELLERSTEIN: In terms of the notice of
11 Satra.

12 THE COURT: Yes.

13 MR. HILL: No, no.

14 THE COURT: In any event, it does not seem to me
15 that the point raised by Mr. Hellerstein is something that
16 should be brought to the jury's attention. I think if you
17 are right that you will be able still to raise it, should
18 there be an unfavorable verdict, and I will consider it
19 at that time.

20 Is that all?

21 MR. HELLERSTEIN: Yes. Except as to what we might
22 want to do with respect to Juror No. 5. Juror No. 5 asked
23 some questions.

24 THE COURT: Yes.

25 MR. HELLERSTEIN: Yes.

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2 THE COURT: With regard to the thing I said I
3 would discuss with him when we came back.

4 MR. HELLERSTEIN: I think the third point made,
5 concerning the possible contradiction between the charge
6 that a contract should be interpreted against the drafting
7 party and how that related to the question of meeting of
8 the minds, was dealt with adequately by your Honor.

9 THE COURT: Yes. I didn't intend to do anything
10 further. The only one I intend to do anything further
11 about was the first question he asked, which was what the
12 extent of an agreement is among the parties as to the extent
13 to which the August 31st document was drafted by Satra,
14 because I did accept your proposed charge that there was
15 no dispute that the August 31st agreement was drafted by
16 Satra, and that is substantially true, but I'm not certain
17 that it is a thousand percent true.

18 MR. SIMON: Could we go off the record for a
19 second?

20 THE COURT: Yes.

21 (Discussion off the record.)

22 MR. HILL: Your Honor, the difficulty I have with
23 the juror's question is that it doesn't seem to treat
24 these points in the order in which they ought to be treated.
25 It seems to me that the issue here is whether or not, as

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2 a matter of fact, a meeting of the minds was reached
3 and particularly with respect to the expenses.

4 THE COURT: Yes.

5 MR. HILL: Now, that's the first issue. If
6 there was in fact a meeting of the minds, it doesn't make
7 any difference whether this contract was ambiguous.

8 What I think may happen here is that this jury,
9 unless they are perfectly clear that there had to be a
10 meeting of the minds, is going to say: Well, it doesn't
11 make any difference whether or not there was a meeting
12 of the minds. This is ambiguous, Satra drafted it,
13 therefore there was an agreement.

14 And that at least, it seems to me, on the whole
15 charge and on the juror's question, is now the problem that
16 is in the case, certainly from our standpoint.

17 THE COURT: I came to the opposite conclusion
18 on the basis of gut reaction, that is, that the concept
19 of ambiguity, if it's of any importance from the point of
20 view of heaven, would be more helpful to the defendant
21 than to the plaintiff because the juror who asked the
22 question seemed to equate ambiguity with a lack of meeting
23 of the minds.

24 But I don't think that we can sit here and
25 speculate all day what is going on in the juror's mind. I've

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2 got to decide what rule I think applies here and what
3 the facts are, and I am going to solve this problem - I may
4 not make either of you happy, but I think it is a fair
5 and proper way to do it - by correcting my charge to the
6 extent of saying that it may have been inaccurate to say
7 it was undisputed but that they have the right to find or
8 not to find, as they choose, that the agreement was drafted
9 by Satra alone. And if during the course of their deliber-
10 ations they find that there are any ambiguities and do find that
11 it was drafted by Satra alone, then I've given them the rule
12 to go by.

13 MR. HELLERSTEIN: With respect to the word
14 "incremental," I don't think it is right to say that that
15 word in isolation should cover the whole spectrum of the
16 treatment of annual expenditures. If there was a phrase that
17 went with it in the agreement, with the use of the word
18 "annual" in the agreement, I think the proper charge
19 as to that would be that it is for the jury to decide who
20 drafted what and how it was used.

21 MR. SIMON: Your Honor, may we be heard again
22 very briefly on this point, because it seems to me
23 important.

24 The general charge about who drafted the agreement
25 is very unfair to the defendants. The only thing that matters,

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2 because the only thing the parties were absolutely in
3 split opinion on was the treatment of expenses.

4 Now, there are only two statements that matter
5 in the agreement, one of which says all expenses are going
6 to be recouped out of revenues. We drafted that. We
7 don't think it is ambiguous.

8 Dr. Stern's testimony very clearly is, one, he
9 put the word "incremental" in, and two, because he put the
10 word "incremental" in, and because of the meaning which it
11 had, the agreement means what he says it means.

12 To create any presumption by drafting against
13 the defendants on those facts is just unfair.

14 MR. HELLERSTEIN: Mr. Simon, you are wrong for
15 two reasons. When Dr. Stern put in the word "incremental"
16 it was after a very thorough exploration of precisely what
17 Mr. Mott and Mr. Hermann had in mind, and it
18 was a term that was used in the context of a very lengthy
19 conversation.

20 And secondly, when Mr. Mott redrafted, renegotiated,
21 on the September 3rd draft, he knew precisely what was
22 involved because the change was a change from "incremental
23 annual" to "cumulative annual." So he was using the
24 words with precision as well.

25 I think the only fair charge is to leave the whole

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2 thing to the jury.

3 MR. SIMON: That is a fact argument, your Honor.
4 Our suggestion simply is don't create an inference, just
5 let the jury decide if the parties agreed. Don't put us
6 under the burden of an inference on ambiguity.

7 THE COURT: I don't wish to do so. But, on the
8 other hand, I have charged on the subject, I have been
9 asked questions about it on the subject, and I believe
10 that the rule is not clearly inapplicable to this situation
11 and I think that the best way to deal with it is to indicate
12 to them that it is up to them to determine whether or not
13 the agreement was unilaterally drafted, and they know what
14 the rule is if they find that is so.

15 MR. SIMON: Your Honor, I have one further
16 comment. My point is that the jury cannot help but believe
17 that 98 percent of the agreement was drafted by Satra
18 but the 2 percent that is in dispute was drafted by Dr.
19 Stern. If the Court would make that clear: if you
20 find, as to the portion of it where ambiguity is claimed,
21 that that was the result either of the efforts of Dr.
22 Stern or half and half, no presumption applies.

23 MR. HILL: That is certainly fair.

24 THE COURT: Yes.

25 MR. HELLERSTEIN: There is no question it was

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2 Dr. Stern's word, but the drafting is different.

3 THE COURT: Wait a minute, Mr. Hellerstein.

4 I am not going to try to decide the facts here. Clearly,
5 it is reasonable to let the jury know that the question
6 of ambiguity must apply to the material they are dealing
7 with --

8 MR. SIMON: That is our point.

9 THE COURT: -- not to the material relating to the
10 term of the agreement or something of that sort.

11 I will charge that.

12 MR. HELLERSTEIN: If there is ambiguity.

13 MR. HILL: I have another point that I would
14 like to raise.

15 MR. SIMON: I have one, too.

16 MR. HILL: I have two.

17 THE COURT: All right. Yes?

18 MR. HILL: Your Honor, I think in the early part
19 of your charge, where you recited the contentions of the
20 parties, in reciting the contentions of the defendants
21 I think you stated that it was our position that Dr. Stern
22 did not have anything to do with the contract between
23 Satra and IBM.

24 THE COURT: I think I said it wasn't necessary.

25 MR. HILL: I have the word "anything" here in

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2 quotes, your Honor.

3 THE COURT: Yes. I said that Satra argues that
4 its contract with IBM was not brought to fruition because
5 of anything that Dr. Stern did.

6 MR. HILL: That is just not our contention, your
7 Honor. We never argued that. And indeed - I mean one place
8 that I can find it is on Page --

9 THE COURT: What would you like me to say?

10 MR. HELLERSTEIN: It isn't your allegation?

11 MR. HILL: Please, may I finish?

12 I said in my summation on several occasions that
13 they, Satra, recognized he, Stern, made a contribution
14 to the IBM situation and they offered him a hundred
15 thousand dollars.

16 This is very crucial to our case, your Honor,
17 certainly crucial to our defense.

18 THE COURT: What do you want me to do?

19 MR. HILL: I would like you to tell this jury
20 that Satra contends, or indeed admits, that he made a
21 contribution and we offered him a hundred thousand dollars.

22 MR. HELLERSTEIN: If your Honor please --

23 THE COURT: I am not going to discuss the offer
24 of the hundred thousand dollars, no, and the reason I
25 stated it as I did is that it doesn't seem to me that it

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2 needs to be taken literally. It meant to me, and I believe
3 this to be your position, that you could have secured the
4 contract if Dr. Stern had been nowhere around, and I
5 think that is really a question the jury has to decide, and
6 I decline to change it.

7 MR. HILL: In every respect, your Honor?

8 THE COURT: What is that?

9 MR. HILL: In every respect.

10 THE COURT: Certainly I decline to change it
11 coupled with the offer of a hundred thousand dollars. If
12 you want me to tell them that it is not literally true
13 that the defendants claim that he did nothing, I'll be glad
14 to say that. I don't know if that helps you.

15 MR. HILL: I would request that your Honor would do
16 that.

17 THE COURT: All right.

18 MR. HELLERSTEIN: If your Honor please, I think
19 that would place an undue emphasis on one of many contentions
20 brought by both of the parties. I think we could all quarrel
21 with particular details, but the overall sense of it seemed
22 to me fairly to lay out what the respective contentions
23 were. I think Mr. Hill's allegation in his pleading fairly
24 supports what your Honor first said.

2' THE COURT: Let me see.

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2 MR. HELLERSTEIN: Especially the first affirmative
3 defense.

4 (Pause.)

5 THE COURT: Suppose I were to put the word
6 "primarily" in there?

7 MR. HILL: All right. It doesn't really satisfy
8 me, your HONOR. I recognize that your Honor doesn't want
9 to draw undue attention to the fact that we offered him
10 a hundred thousand dollars, although we certainly did it,
11 I hope, yesterday. But we have admitted here that he
12 introduced them and that he did make a contribution.

13 THE COURT: All right. Supposing I simply say that
14 you admit that he introduced them and made a contribution?

15 MR. HILL: Fine, your Honor.

16 THE COURT: Is there anything else?

17 MR. HILL: Only one other thing, your HONOR,
18 which I don't want to argue. I just simply want to preserve
19 the record.

20 We do feel, and particularly now having heard
21 the entire charge, that the defendant was and is entitled
22 to a charge on the law of innocent misrepresentation.

23 THE COURT: Yes, I understand that you do, and
24 I tried to give my reasons for disagreeing with that.

25 MR. HILL: I have nothing else.

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2 MR. SIMON: One final point I am not really clear
3 that came out.

4 Right at the end of the charge you gave the
5 instruction in regard to the legal defense of lack of
6 consideration, and you said, it seems to me, the question
7 is whether Satra got what it bargained for. It seems to
8 me the proper rule is whether Satra got what it bargained
9 for through the efforts of Dr. Stern rather than simply
10 whether it got something from IBM. I think he had to have
11 something to do with it.

12 THE COURT: I decline to elucidate on that. I
13 think that is clear, at least by implication.

14 (In open court; jury present.)

15 THE COURT: There are two or three points which
16 counsel and I believe that perhaps clarification will be
17 of some use to you.

18 First of all, with regard to this question of
19 ambiguity, let me say that it is for you to decide who
20 you find drafted what portion of the agreement. I think
21 I overstated it by saying it is agreed that there is no
22 dispute on the point, although I don't think there is a
23 dispute as to very much.

24 The second is that, of course, the rule relating
25 to ambiguity, if you find any, applies only to the subjects

1 within the agreement that you are dealing with at that
2 time. I mean, let us take the expense question, for
3 example. You may find that there is ambiguity with regard
4 to expense but not ambiguity with regard to anything
5 else, and you don't apply the rule except to the subject
6 that you are dealing with.
7

8 That is the first of three points that I have
9 here.

10 The second is that as examples of alleged misrep-
11 resentations on Dr. Stern's part I referred to the fact
12 that Satra claimed that Dr. Stern stated that he had influence
13 with IBM and that he was indispensable to IBM. I should
14 point out to you that if you find that Dr. Stern made such
15 statements, you may find that they were statements of
16 opinion on his part and not necessarily misrepresented as
17 fact by him.

18 Finally, I stated that it was Satra's contention
19 that the contract with IBM was not brought to fruition
20 because of anything that Dr. Stern did, and counsel for
21 Satra has pointed out to me that that is not quite Satra's
22 position, that Satra does admit that Dr. Stern introduced
23 Satra to IBM and made a contribution.

24 Now, ladies and gentlemen, I have covered all
25 the points that counsel wanted me to and I ask the clerk

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2 to swear in the marshals and you will go to the jury room
3 to deliberate.

4 If you want any exhibits, simply ask for them.

5 I think I made that clear.

6 We will send out for lunch for you so you don't
7 have to go out in this weather.

8 (Two marshals were sworn.)

9 THE COURT: All right. I believe Mr. Green
10 is in the jury room. Will you ask him to come in before
11 the jury goes in there?

12 (Alternate juror was discharged.)

13 THE COURT: All right, ladies and gentlemen,
14 you may go with the marshals.

15 (At 10:56 a.m., the jury retired to commence
16 its deliberations.)
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2 THE COURT: Gentlemen, I am going to chambers.

3 If the jury asks for any exhibit, you agree among yourselves
4 what they are and send them in to them. They may ask for
5 them all at one time.

6 Secondly, if they ask for any reading of the
7 testimony, I ask you to agree on it in advance to the extent
8 possible. And if you believe that it is not necessary for
9 me to come down merely to sit here while they read
10 testimony, I would prefer it. If there is some reason for
11 me to come, I will. Of course, if there are any questions
12 for the Court, I will obviously come down.

13 (Recess.)

14 (At 11:25 a.m., a note was received from the
15 jury.)

16 (At 11:53 a.m., the jury returned to the court-
17 room.)

18 THE CLERK: We have a note here which is marked
19 Court's Exhibit 1.

20 (Court's Exhibit No. 1 marked.)

21 THE CLERK: You asked for a copy of the charge.
22 The Judge cannot give you his charge. But he said if you
23 have any particular questions referring to the charge,
24 would you write him a note and ask the question.

25 You also asked to have testimony read. That will

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2 be read now.

3 (Record read.)

4 THE CLERK: I am handing you the exhibits you asked
5 for (handing).

6 You can retire to the jury room.

7 (At 12:135 p.m., the jury again retired to
8 continue their deliberations.)

9 (Recess.)

10 (At 2:07 p.m., the jury returned to the
11 courtroom.)

12 (Jury roll called - all present.)

13 THE CLERK: Mr. Foreman, have you reached a
14 verdict?

15 THE FOREMAN: Yes, we have.

16 THE CLERK: How do you find? For the plaintiff
17 or for the defendant?

18 THE FOREMAN: After deliberating and evaluating
19 the evidence, we have taken into consideration the charge
20 and we render a verdict unanimously in favor of the
21 plaintiff.

22 THE CLERK: So say you all.

23 THE COURT: Mr. Hill, do you wish to have the
24 jury polled?

25 MR. HILL: If you please, your Honor, yes.

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2 THE COURT: All right.

3 (Each juror upon being asked "Is that your verdict?"

4 responded in the affirmative.)

5 THE COURT: Ladies and gentlemen, I thank you

6 very much for the attention that you gave to us during

7 your duties in this case. The basic outlines were perhaps

8 simple but the details were complicated in a way, and I

9 noticed throughout the trial that you really were paying

10 close attention and giving it the consideration that any

11 serious dispute between parties deserves.

12 (Jury discharged.)

13 THE COURT: Gentlemen, we will have to make

14 arrangements, but we can do that in the robing room,

15 for the trial of the issue of damages, and I wonder if there

16 is anything anybody wishes to do at this time for the record.

17 I believe you have time to make any motions you wish

18 thereafter.

19 MR. HILL: To preserve the record, your Honor,

20 I make a motion for judgment notwithstanding the verdict.

21 THE COURT: That motion is denied.

22 If you will come into the robing room, I will

23 call chambers and we will see when we can get together

24 for the rest of it.

25 - - -

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MARVIN STERN,

Plaintiff,

-versus-

72 Civ. 143

SATRA CORP. and
SATRA CONSULTANT,

Defendants.

-----X

New York, N.Y.
April 17, 1974
10:00 a.m.

Before:

Hon. Morris Lasker,

District Judge.

APPEARANCES:

STROOCK & STROOCK & LAVAN, Esqs.
Attorneys for Plaintiff

By: ALVIN K. HELLERSTEIN, Esq.
GERALD D. FISHER, Esq., of Counsel

SPEAR & HILL, Esqs.

Attorneys for Defendants

By: THOMAS W. HILL, Esq.
HENRY W. SIMON, Esq., of Counsel

ALSO PRESENT:

ROBERT PATERSON, Esq.

(Case called.)

MR. HELLERSTEIN: The plaintiff is ready.

MR. HILL: The defendant is ready.

THE COURT: Mr. Hellerstein, we are now trying, on a non-jury basis, the question of damages, and to the extent it applies, if it does apply, the question of mitigation of damages.

Does the plaintiff have any testimony they wish to put before me at this time?

MR. HELLERSTEIN: No, your Honor, it does not. The plaintiff has put in the December 1973 agreement which defines the revenues that Satra has received and expects to receive under the contract from IBM. The contract replaces the previous one of September 1971 and the rest is a logical and a legal extension, which we have discussed in the memorandum which we submitted to your Honor this morning.

THE COURT: Very good. Thank you.

MR. HILL: Before we put on our first witness, your Honor, I had a very brief opportunity to look at the memorandum submitted by Mr. Hellerstein this morning.

I would like to renew a point that I made during the course of the trial, but I think we must do it before we go forward with whatever evidence is to be taken.

That is simply this: That the only basis for calculating any damages based on payments received under the 1973 contract rests, it seems to us, on the legal conclusion that the 1973 contract is a "renewal" of the 1971 contract.

First let me say this: the two contracts are not in any way similar. They are based on two entirely different premises by their terms. This is the IBM-Satra agreement.

The 1971 agreement provides for compensation to Satra basically by means of a commission on sales made in the Soviet Union and there is also this payment or provision for two payments of \$25,000 a piece which were not to carry forward during the life of the contract and the contract expressly says that after a period there will be a re-examination as to whether or not there are to be any further payments.

The facts are, as your Honor knows --

THE COURT: Any further --

MR. HILL: Lump sum fixed payments. As your Honor knows from the record, no such payments were made while the 1971 contract was extant.

The \$50,000 was paid and that was the end of that. While the 1971 contracts provided for Satra to perform what has been variously described here as administrative

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2 services, such as vizas, hotel rooms, etc., there was no
3 provision in the 1971 contract for Satra to be compensated
4 for those services as such.

5 In other words, they weren't paid a fee as they
6 later were in the 1973 contract providing the services.

7 The 1973 contract is an entirely different
8 ballgame. There is no provision in the 1973 contract for
9 the payment of commissions on sales by IBM subsequent to the
10 effective date of that contract. There is a recognition in
11 the contract that Satra might be owed moneys, and I
12 emphasize the "might be" part, under or on account of sales
13 that were made prior to that contract being entered into.

14 Indeed that was provided for in the 1971 contract
15 itself. In other words, if sales were made during the life
16 of the contract but the payments were received thereafter,
17 why Satra would get paid whenever those payments were
18 received.

19 THE COURT: It's pretty normal.

20 MR. HILL: Yes, pretty normal.

21 So that that that provision in the 1973 contract
22 really, in a sense, adds nothing nor indeed does it take
23 away from anybody's legal obligations.

24 What is important, however, and I think it's the
25 key issue here with respect to the 1973 contract, both in

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terms of whether or not there was, in fact, a renewal as a matter of law and also on the calculation of the damages itself, is this: that the structure of the contract, the 1973 contract, changes. It changes in that it provides, and very expressly provides in paragraph two --

THE COURT: Is the copy of the contract part one of the memorandum?

MR. HELLERSTEIN: It's Exhibit L, your Honor.

MR. HILL: I don't have an extra copy, your Honor. Mr. Appel has taken to his bed with a flu and when one is suddenly deserted by one's lawyer --

THE COURT: That is all right.

MR. HELLERSTEIN: This is the exhibit as marked. This is the new contract, Exhibit L. This is the Stern-Satra contract, D. Exhibit I is the 1971 basic contract. Here is the prior group.

THE COURT: All right. I do have most of them.

MR. HELLERSTEIN: Do you want C or D?

MR. HILL: I don't think you need C for these purposes.

THE COURT: What is it you want to point out?

MR. HILL: What I would like to point out to the Court in this regard is -- and I will come back to paragraph one of this agreement in a minute.

1
2 THE COURT: You are talking about the 1973
3 agreement?

4 MR. HILL: Yes, your Honor. If your Honor will
5 look at page two, paragraph two where reference is made to
6 this, and it's very specific, it says, "You act as a
7 financial consultant," and it goes on to say, "for this and
8 other services more fully described in paragraphs four and
9 five we are going to get this monthly sum."

10 I would like to say parenthetically that the
11 word "retainer" does not appear here. When one looks at
12 paragraphs four and five you will see that they describe
13 basically these administrative services.

14 This is what this is all about, provide the
15 arrangements required by.

16 In other words, we have the payment of a monthly
17 sum and that is the way it's described. That is for certain
18 specified services.

19 Then it goes on, of course, to provide for the
20 payment of any commissions that have been earned in the past
21 and then it provides later on for the payment of an undefined
22 payment in connection with other services that might be
23 performed, a fee to be agreed upon in the future.

24 Now, that brings us all the way back, it seems
25 to me, to the legal question. There is no doubt, I don't

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think, and there is really no dispute that these contracts are complete, that there is nothing ambiguous about them. They should be governed by their terms and indeed what they say. I don't think there is any necessity here, and would submit there is no necessity, for parol evidence as to what the parties meant or they didn't mean.

So the rule of law, as we understand it, your Honor, and I must say it's difficult to find authority on it because everybody seems to assume this to be the case, certainly the cases themselves that we have been able to find in the time available to us.

On this question of what is a renewal and what isn't a renewal, it arises in the case of leases and in that kind of contractual circumstance, the rule is, at least as we understand it, that there is no renewal unless the second contract is and contains the same terms, the same provisions as the contract which preceded it.

In other words, if you have a second contract and the terms are markedly different with entirely different consequences brought about by changing circumstances there simply cannot be, as a matter of law, renewal.

THE COURT: I haven't studied your case yet, but I can see the difference between the question of what constitutes a renewal, if that is the right word to use in the

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circumstances in a two-party situation in which, for example, IBM and Satra alone were concerned and the question arose as to whether a lease between them had been renewed or had not, or something of that sort, and a three-party situation where the third party did not have an opportunity to participate in the negotiation of the new agreement because it would seem to me too facile a way -- and I am not suggesting Satra was trying to do this -- but the result of too narrow a view of this situation would be to create a too facile method by which two parties could exclude a third party by altering a few terms in the agreement.

MR. HILL: I don't have any problem with that, your Honor. I don't think. I think that raises a different issue in terms of whether or not it's a renewal or not.

In other words, I think you only get to the question that your Honor raises upon an allegation, if you like, on the part of the plaintiff who was not a party to the negotiations between the defendant and the third party.

If there is a charge, which I don't think there is in this case, and I will be corrected I am sure, very quickly, if there is such a charge, that the 1973 contract was initiated by Satra for the purpose of defeating Dr. Stern's claim -- well, putting it another way, I think that the rule with respect to renewal applies as long as the

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2 second contract is entered into -- how should I put it --
3 at arm's length in good faith resulting from a change in
4 business circumstances, if you like.

5 THE COURT: I come to this question with the
6 advantages of knowing nothing of what the law is on the
7 subject at the moment. You tell me there isn't very much
8 and I am not surprised because it is a special question.
9 I do have certain reactions which I will articulate and then,
10 if you wish to say more, of course, you may and I would
11 like to hear from Mr. Hellerstein.

12 The first is it seems to me in a situation of
13 this kind, as distinct from the one I referred to as the
14 two party situation, that a key factor would be not only
15 what the terms of the agreement were, that is in regard to
16 payment and matters of that sort, but whether the second
17 contract on the whole, if not exclusively, dealt with the
18 same general subject matter as the first. Certainly that
19 would seem to me to be a telling criteria.

20 The second point that I make and comment on
21 what you said, that the issue of a third party's rights
22 doesn't arise unless one or both of the other two parties
23 proceed in bad faith might be correct, but I am not sure
24 it's obviously correct.

25 It would seem to me even if they proceeded in

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10

1 good faith but that they created a renewed contract, that
2 third party beneficiary is entitled to his benefits. These
3 are just immediate reactions to the question. I am sorry
4 I have not had a chance to study the law because I have
5 been trying a case every minute since I last saw you.
6

7 But the impression that I have, Mr. Hill, is
8 that -- well, it's not an impression. I don't think I am in
9 a position to decide in advance, as a matter of law, before
10 we hear any testimony whether or not this contract constitutes
11 a renewal. I think that you ought to proceed on the
12 assumption that I might rule that it is a renewal and put
13 any evidence that you want before me and you are also
14 entitled, as far as I am concerned, to put any evidence
15 before me with regard to the question of its renewal although
16 you stated that you thought that the matter should be
17 decided on the faces of the contracts.

18 MR. HILL: I understand that and I assume that
19 your Honor would do no less in the circumstances, but I
20 think for the record we must protect our position.

21 THE COURT: I am glad you know what the position
22 is and it will alert me to the things I should look for.

23 MR. HILL: It would have a bearing on what we
consider to be relevant evidence with respect to these IBM
contracts. In other words, it is our view that it is

2 certainly relevant, even our own statement of -- how should
3 I put it -- the motivations, the circumstances which led
4 to the execution of the 1973 contract.

5 However, and I think this is in our view crucial,
6 it is our view that these contracts do express the relation-
7 ship between the parties, whatever that relationship may be.

8 THE COURT: I think it's certainly a prima facie
9 presumption.

10 MR. HILL: We will, I think, be vigorous, to say
11 the least, with respect to what we think is the proper
12 application of the parol evidence rule here. It seems to
13 us it would be highly improper to examine, for example, a
14 representative of IBM on what he thought a particular term
15 meant in the sense that that would not be binding on us
16 certainly.

17 THE COURT: I think that is a good point to make
18 and lawyers, even judges, are not very happy about going
19 behind contracts, but we have a special situation now that
20 we have to feel our way now and at least on the question of
21 what Mr. Hellerstein claims there was bad faith he would
22 certainly be entitled to depend on that.

23 MR. HILL: Of course. I ask your Honor to read,
24 because I think it puts a lot of the testimony you will hear
25 into some context, paragraph one of the 1973 agreement which

provides expressly that the 1973 agreement is terminated and there is a relinquishment of all claims except with respect to these commissions which were earned at an earlier point in time.

THE COURT: I note that.

MR. HILL: With that, your Honor, I have nothing to add and we are prepared to go forward.

THE COURT: Do you want to comment on these points at all, Mr. Hellerstein, before we call any witnesses?

MR. HELLERSTEIN: Yes, your Honor. I think in understanding this situation we have to go back to the original contract between Dr. Stern and Satra, which is Exhibit D and to note, in connection with this, that this contract was made before any deal was made with IBM.

THE COURT: The August 31 or September 1st?

MR. HELLERSTEIN: Yes. It shows the parties had not even gone to the point of discussing terms with IBM. This looked forward to the possibility of an agreement and Dr. Stern and Satra were to form a proposed joint venture with respect to the possibility of that deal and the deal it eventuated.

Dr. Stern's compensation was to be 50 percent of gross revenues received from IBM -- I will leave out Stromberg Carlson.

It was to be payable for all amounts accrued by Satra, all amounts, and it said during the term of any agreement signed by Satra with IBM, that is one duration, and a second duration --

THE COURT: Where is that?

MR. HELLERSTEIN: The body of paragraph B, as in boy, of proposal number one. It's the third page of the Satra letter.

These commissions will be payable for all amounts accrued by Satra. The word "these commissions" refers to Dr. Stern's compensation. These commissions will be payable for all amounts accrued by Satra.

During the term of any agreement signed by Satra with IBM -- and that is the first duration.

The second duration point is "plus all commissions that may be earned from sales then under negotiation."

In other words, when the first IBM-Satra deal ends, there may still be commissions coming in on sales negotiated during that period but consummated afterwards. That is a second duration interval.

The third duration interval reads as follows: "Commissions, that is compensation to Dr. Stern, will also be paid during the term of any renewal of such agreement

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provided Stern continues to provide such time necessary to service this agreement."

What these parties were contemplating at the time, that is, Dr. Stern and Satra, was a long-term relationship to abide not only an initial contract with IBM, the term and duration of which was completely unknown, but an extended period beyond that. That is what we read out of this agreement.

Now, we also know that the parties, among themselves and in contemplation of a possible deal with IBM, were discussing numbers of possibilities. Mr. Gifford testified about retainers of \$100,000 to \$500,000 a year. Mr. Oztemel talked about sizable retainers. Satra was supposed to do numbers of different kinds of things for IBM and they were looking to get compensated, as best they could, subject to negotiations of retainer payments, by commissions, either one or both. Everything was unknown at that point.

The only thing that was known was that Dr. Stern and Satra would be in it together, so they thought.

That is the reading of Exhibit D. Then we come to the first IBM contract which is Exhibit I. There are a number of things that are interesting here. On page two and page three there are two interesting paragraphs, among many, that describe what Satra was to do for IBM.

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Paragraph C says the consultant shall provide such office space and administrative services as the company may, from time to time reasonably require. Other of the paragraphs describe other types of administrative services that Satra was to provide.

Paragraph H on page three makes reference to the barter and financing transactions that were to be called upon on Satra, that IBM was to require. The agreement contemplated that Russia might pay other than western freely convertible currency and Satra was given the obligation to convert those funds.

THE COURT: Would you point to those subjects that appear again in the 1973 agreement?

MR. HELLERSTEIN: Yes, your Honor. I will get to that.

Paragraph four talks about how much Satra was to get for this. As consideration they were to receive commissions equal to three and a half percent of the revenues and under paragraph B they were also to get a retainer, which was an advance and described as such chargeable against future commissions.

THE COURT: I think you said paragraph four for the record. Paragraph Roman two page four.

MR. HELLERSTEIN: Yes, article two, Roman two,

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2 paragraph B, page four, Exhibit I.

3 Now we come to the December 1973 agreement and
4 we notice a few things here.

5 First of all, this agreement begins before the
6 1971 agreement ended. The 1971 agreement had a five-year
7 term.

8 THE COURT: Before it ended by its own terms.

9 MR. HELLERSTEIN: Or before it could be
10 cancelled. The 1971 agreement was to last for five years,
11 that is until September 21, 1976. It was terminable by
12 IBM at the end of three years, if the annual sales volume
13 of IBM did not exceed \$50,000,000. That means that IBM did
14 not have the right to terminate it until September 21, 1974,
15 several months hence.

16 The parties effective September 21, 1973, that
17 is the year before the right to terminate, on an agreement
18 made in September 1973, terminated. They, in effect,
19 replaced that agreement with a new agreement.

20 When we look at this new agreement, which is
21 Exhibit L, we find some interesting things in it. There is
22 no specific definition in terms of specifics of what Satra
23 is to do but by general reference we find that Satra is
24 required to do what they were always required to do, namely,
25 provide administrative services and provide financial

services.

But this agreement, like the old agreement, contemplated that Russia might pay in currency other than freely convertible western currency. Those terms are found in this agreement.

THE COURT: Paragraph five, I believe.

MR. HELLERSTEIN: That is where it is, your Honor. Paragraph five, yes.

IBM was to pay Satra consideration for these services. This consideration instead of being a commission was broken down into two or three components. The first components were monthly sums. These were monthly sums in consideration for services to be rendered.

It is precisely the thing we are talking about. We talk about retainers and the dictionary defines it as such.

The second method of compensation was denominated a transaction fee. That is as and when Russia decided to pay in other than freely convertible western currencies, Satra would have the obligation either itself to make the conversion that was necessary, either by financing arrangements or by barter, or switch or whatever, or to find someone else to do it and IBM was to pay a transaction fee to Satra that was commercially reasonable, understandings that

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2 I suppose exist.

3 A third method of compensation was Satra would
4 be able to get revenues by dealing in these blocked funds
5 or Russian currency or timbre or whatever else Russia wanted
6 to pay.

7 We come, I think, to this fair inference, that
8 the only thing that changed in the December 1973 agreement
9 was the compensation by IBM to Satra, the method of compen-
10 sation.

11 IBM instead of having to pay what averages out
12 to four percent of its sales to Russia, which could have
13 been astronomical, made a deal with Satra that it would pay
14 precise fixed amounts over a period of time. In effect, it
15 was in accord and satisfaction. The parties terminated an
16 agreement that was to run by its terms until September, 1976
17 and could not be terminated except for cause until
18 September 1974 and replaced it with a different agreement
19 that had a term that was to run indefinitely, according to its
20 words, except that either party could terminate beginning
21 February 1, 1977 and year to year thereafter.

22 So what we have is an agreement that replaces
23 an older agreement before the older agreement was to lapse
24 or terminate.

25 Secondly, we have precisely the same relationship

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2 with precisely the same parties making a more comfortable
3 financial arrangement as between them. How this could be
4 applied or interpreted in such a fashion as to evade obli-
5 gations that the jury found were properly due and owing
6 from Satra to Dr. Stern is a mystery. It really is an
7 artiface in any term that is properly used in a courtroom
8 or in the English language, because what we have is one
9 agreement standing in place of the other agreement extending
10 by just a very few months the term of the original agreement,
11 providing for generally the same thing with the same
12 relationship, having the same objectives, having the same
13 purposes, calling upon the parties to do roughly the same
14 kinds of things they were to do before.

15 It is to be argued that this is something brand
16 new and different free, in some mysterious fashion, of the
17 obligations duly owing from Satra to Dr. Stern.

18 I don't think we have any specific obligation to
19 allege and prove bad motive or bad faith. I think those
20 terms are immaterial. What we are looking for is contract
21 compensation.

22 Dr. Stern entered into a joint venture with
23 Satra, a valid and enforceable joint venture. He was ready
24 to perform and do what he had to do. Dr. Stern defined
25 everything he intended to do, that is to be the communication

1 hub, as it were, defining what was technologically useful for
2 IBM to Satra and defining to IBM what Satra could do for
3 IBM and he was denied the ability and the right to continue
4 with that and Satra went on its way.
5

6 We are not arguing here if Dr. Stern was there,
7 more profits would have accrued. That is certainly a pos-
8 sibility but we are certainly arguing that Dr. Stern cannot
9 suffer the indignity and illegality of having denied to him
10 the compensation that is justly due to him under his agree-
11 ment. That is the position I take.

12 THE COURT: Thank you, Mr. Hellerstein.

13 MR. HILL: Your Honor, I am going to ask
14 Mr. Simon to examine Mr. Curtin, who will take the stand.

15 THE COURT: All right.

16 MR. SIMON: This witness has not been sworn,
17 your Honor.

18 THE COURT: All right, we can remedy that in
19 short order.

20 (Continued on page 21.)
21
22
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2 M I C H A E L E. C U R T I N, called as a witness
3 on behalf of the defendant, having first been duly
4 sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SIMON:

7 Q Would you state your name, please.

8 A Michael E. Curtin.

9 Q Mr. Curtin, how are you employed?

10 A Treasurer of Satra Corporation.

11 Q How long have you been associated with Satra
12 Corporation?

13 A Since early February of last year.

14 Q Very generally would you tell the Court your
15 educational and business background.

16 A In 1961 I received a BBA in Finance from the
17 University of Notre Dame. Subsequent to that I spent two
18 years in the Peace Corps and then I returned, received an
19 MBA in Accounting from the University of Chicago Graduate
20 School of Business.

21 In June of 1965 I then went to work for
22 W. R. Grace & Company in New York as a trainee, was sent to
23 Chile in South America in March of 1966 where I became
24 Administrative Assistant to a multi-production facility that
25 Grace had in that country.

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I returned in 1968 and went to work in the Corporate Finance Department of W. R. Grace as a financial analyst. I then became Director of Planning of Special Projects for the Industrials Chemicals Groups of W. R. Grace which position I held until June of 1970.

In 1970 I joined two other friends of mine in a venture which was called Marine International Corporation which I subsequently left in November of 1972, I guess it was.

THE COURT: You went south in February of 1973.

THE WITNESS: Right.

Q You are now the chief financial officer of Satra?

A Yes.

Q Under your responsibilities you have kept its financial records and documents and other evidences of its transactions?

A Right.

Q Have you had occasion to become familiar with the controversy between Marvin Stern and Satra Corporation?

A Yes, on an accounting basis, a peripheral basis, not a legal basis.

Q Would it be fair to state that you had no part whatsoever in any of the acts, conferences, meetings or

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agreements that led up to this controversy?

A Can I ask a question?

THE COURT: Yes.

THE WITNESS: You mean the original contractual relationships?

Q Right.

A No, I didn't have anything to do with it.

Q Have you, at my request, had occasion to look over a statement of the income which has been received from IBM to Satra Corporation for the operation of the Stern contract from September '71 through March of 1974?

A Yes.

MR. SIMON: I am going to ask the reporter to identify this schedule which has not been previously identified.

(Defendant's Exhibit 1 was marked for identification.)

Q Mr. Curtin, have you had an opportunity to look over what has now been marked for identification as Defendant's Exhibit No. 1?

A Yes, sir.

Q What is the exhibit -- and would you address yourself to each of the three pages of it in your description.

A Well, the first page entitled "First year," is a

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basic summary accounting of the sums of money received by Satra from IBM in the first column. I believe we may have the dates transposed. I think there is a typo, 25,000, two lump payments totalling \$50,000.

Then in the fifth column you have reimbursement of out of pocket expenses which totals \$2,405.38.

THE COURT: Can I suggest since we are trying to find out what this document is at the moment, that you don't have to tell us the details. Just tell me in general, otherwise you might as well put it in evidence.

A Reimbursement of out of pocket expenses represents those sums of money received by Satra and New York in reimbursement for our payments to an organization known as American Travel Abroad which represents tickets and vouchers purchased by Satra for IBM personnel travelling to the Soviet Union.

Q Mr. Curtin, let me ask you a general question.

Does Defendant's Exhibit 1, broken down as it is in three years, represent what might be termed a recap of the revenues received from IBM as well as some mathematical calculations applied thereto through March of 1974 based on a summary of the records under your control?

MR. HELLERSTEIN: If your Honor please, I have no problem about any recap or recapitulation of revenues

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2 received. In fact, we have those in evidence in Exhibit
3 DDDD.

4 The mathematical extensions are nothing more
5 than a disguise of various legal contentions which have no
6 right to be in a recapitulation and, on the best evidence
7 rules, on the grounds of irrelevance, I would object to
8 anything more than a recapitulation of revenues.

9 THE COURT: Something like this would be handy
10 if it fairly reflects the facts. I think what I would like
11 to proceed to is to get the answer to the question and
12 allow you a voir dire if you want. If I am not satisfied
13 with the answer, I will allow your objection.

14 A I believe it represents the recapitulation of
15 revenues as you have stated, some mathematical extensions
16 theret.

17 MR. SIMON: For the purpose of anticipating some
18 of Mr. Hellerstein's questions and perhaps shortening the
19 voir dire, it might be helpful if I ask --

20 THE COURT: You can ask him how he made it.

21 Q In fact, Mr. Curtin, let's look at the columns
22 which are past the column marked "reimbursement out of
23 pocket expenses" and I will ask you if it's not a fact in
24 the column marked "expenses per schedule" that particular
25 figure was placed there by me simply for the purpose of

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reflecting the fact that the schedule on the contract with Dr. Stern anticipates a \$100,000 agreed figure of expenses per year?

A That is correct.

Q That is not your figure, that is my figure?

A That is your figure.

Q Likewise the 40 percent expense application was placed on the exhibit by me simply by taking the percentage of 40 percent and applying it against revenues as is suggested by one of the exhibits which I term the Hauser draft for purpose of convenience.

A That is true.

Q And the figure paid to Stern is, in fact, your figure reflecting the amounts of money which were paid to Dr. Stern by Satra Corporation?

THE COURT: That is not disputed anyway.

MR. SIMON: With the obvious qualifications and, of course, taking in mind the fact that we are trying this before the Court, and, indeed, a knowledgeable Court, we offer the exhibit for whatever it may be worth broken down as between actual figures and certainly some mathematical extensions.

THE COURT: All right.

(Continued on page 27.)

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VOIR DIRE EXAMINATION

BY MR. HELLERSTEIN:

Q Mr. Curtin, when the retainer payments for \$25,000 were paid by IBM to Satra were you part of Satra?

A No.

Q When IBM paid those, do you know that they paid those as an advance against commissions?

A At the time in 1971?

Q Yes.

A No.

Q Do you know they did not? Would you know one way or the other?

A The only thing I know about those payments is that subsequently IBM sent an accounting in November of 1973, I believe, at which point they recapitulated or they summarized sales, billings, receipts, commission amounts, and what had been paid to Satra under those, and on that letter I believe the two sums of \$25,000 apiece are identified by them in that letter as being advance commissions. That is the only thing I know.

Q Why did you not put them down then under the box of advance commissions? Was that because you received any instructions from counsel in how to categorize this chart?

A No. As I believe counsel said, he prepared this

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chart. He asked me for verification of the revenue figures. He was the one who classified them as original retainer. I had brought it first to his attention that in the letter from IBM of November whatever, they are identified by them as being advance commissions and for his own reasons he chose to put them where he put them.

MR. HELLERSTEIN: If your Honor please, I object to the document in evidence. It does nothing more than repeat what is already in evidence as Exhibit DDDD except to advance a number of contentions that Mr. Simon prepared. It might as well have been he to be the witness and not the interrogator.

THE COURT: I believe I will have to sustain the objection except perhaps during some recess Mr. Simon and Mr. Hellerstein can agree that the deletion of characterizations, for example, may be made. I know from the preface or trial, of course, that \$50,000 was received and I know that 12,500 was paid out to Dr. Stern.

I know there was a reference to \$100,000 in one place and a reference to 40 percent in another, which if applied \$50,000 would produce \$20,000, so if this is to be presented to me as a part of a memorandum of law or something of that kind, I would accept it, Mr. Simon.

But as evidence that these \$50,000 were

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received as original retainers, I don't think I can receive it.

MR. SIMON: I don't mean to argue it. It's meaningless. We are all aware of the facts and the witness testified that he has no personal knowledge of these things and that I prepared it. But we do need something to work with rather than be thumbing through different exhibits.

THE COURT: For the purpose of referring to figures without my accepting any characterization of their significance I will be willing to be guided by this.

MR. SIMON: If the Court please, I would be willing to stipulate with Mr. Hellerstein that the words at the top were included by me and have no significance, are not to be construed as evidence of that, indeed the entire exhibit is merely a numerical breakdown to be used in our discussions.

MR. HELLERSTEIN: Then this document is nothing more than a repeat of Exhibit DDDD which was stipulated to by Spear & Hill, by our firm, and by Paterson, Belknap & Webb.

THE COURT: To what extent would it differ from Exhibit 'DDD?

MR. SIMON: It's easier to read.

THE COURT: For the purpose of this discussion

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2 I will go along so that Mr. Simon can the questions in the
3 manner he wishes to. I will look at the paper he wants to.

4 But the evidentiary material, if anybody wishes
5 to comment on the evidence, will be found in Exhibit DDD
6 and that will be regarded as the evidence of the figures.

7 MR. SIMON: That is entirely okay with me.

8 DIRECT EXAMINATION

9 BY MR. SIMON (Continued):

10 Q If you will look at the schedule, I ask you to
11 direct your attention to the column that is marked
12 "reimbursement of out of pocket expenses."

13 Do you see that column?

14 A Yes, sir.

15 Q Have you again, at my request, prepared
16 internally in the Satra office a breakdown of the reimburse-
17 ments which have been received by Satra and what they are
18 for?

19 A Yes, I have.

20 Q I hand you what I will mark, if it's all right
21 with the Court and the reporter, Defendant's Exhibit No. 2
22 for identification.

23 (Defendant's Exhibit 2 was marked for
24 identification.)

25 Q Mr. Curtin, do you have before what has now been

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2 marked as Defendant's Exhibit No. 2 which I will describe
3 as comprising three pages of which the first page says in
4 the upper right hand corner, "Schedule B Summary"?

5 A Yes.

6 Q What is the import of the figures which are
7 prepared on the three pages thereby displayed?

8 MR. HELLERSTEIN: I object on the grounds of
9 irrelevance and possibly other grounds that may come to me
10 as we go along.

11 We are making no claim with regard to reimbursed
12 moneys. Dr. Stern has no right for any money that Satra
13 receives by way of reimbursement from IBM arising from out
14 of pocket expenses made by Satra.

15 THE COURT: You are willing to accept this
16 figure as the figure?

17 MR. HELLERSTEIN: It's irrelevant. I think it
18 should not be in the case.

19 THE COURT: If you agree on the amount -- to
20 prove what the amount is -- it's not just a question of
21 theory.

22 MR. HELLERSTEIN: They don't prove the amount
23 because it has nothing to do with the case whatever.

24 The second point here is that they have a
25 column on page two of incurred and non-reimbursed --

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THE COURT: Talking of Exhibit 2?

MR. HELLERSTEIN: Yes, incurred and unreimbursed expenses to which I take exception because the only aspect of expenses that could conceivably be relevant with respect to commission revenue are expenses that are put on the schedule, that is the schedule to Exhibit C and Exhibit D, the Stern-Satra agreement.

The parties agreed that actual expenses would be irrelevant. So why are we bothering ourselves with actual expenses?

THE COURT: What do you have to say in answer to the argument of the significance of the actual expenses?

MR. SIMON: In view of the stipulation by Mr. Hellerstein, we accepted that. It has been my impression I would have to admit, although I do not know to what it traces, that Dr. Stern has taken some position that expenses to be reimbursed Satra were on a 40 percent basis across the board and that Satra was not entitled to dollar for dollar credit on expenses whether they were directly paid by IBM or recouped per the schedule.

Certainly it's my position we are entitled to 100 percent recoupment.

Mr. Hellerstein agrees it's dollar for dollar and so it's stipulated --

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MR. HELLERSTEIN: Mr. Simon is perverting the arguments. Our position is that the revenues received by Satra are subject to sharing with Dr. Stern. If Satra in addition to its revenues asks IBM for reimbursement of out of pocket expenses, for example, for advancing air travel or advancing documentary expenses for visas and the like and IBM pays these amounts back to Satra, that is not our concern and not the concern of any lawsuit.

THE COURT: And you make no claim for it?

MR. HELLERSTEIN: That is right.

THE COURT: Is that what you have in mind?

MR. SIMON: I am somewhat lost in the morass.

THE COURT: That concept doesn't seem to me to be very morassic. That concept is simply, as I understand it, if Satra ever shells out any money or expenses for IBM and gets it back, Dr. Stern makes no claim to any such money.

Have I oversimplified?

MR. HELLERSTEIN: I don't think you have. In fact, if we go back to Exhibit DDDD, this document states precisely and it's a stipulated document, it states the revenues that have been received by Satra to which we make claim. It also has two items, three items of reimbursement of expenses incurred for IBM World Trade Corporation.

It's very plain from our papers that we make no

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claim with respect to those three items. They total about \$22,000 and they are not in the case.

THE COURT: All right.

MR. SIMON: Agreed.

Q Mr. Curtin, have you, at my request, prepared what we will mark for identification as Defendant's Exhibit 3?

(Defendant's Exhibit 3 was marked for identification.)

Q Did you prepare Defendant's Exhibit 3?

A Yes, I did.

Q What, in fact, is Defendant's Exhibit 3 which, for the purpose of the record, I will describe as comprising three pages and being identified as expenses incurred relating to IBM business?

A I was asked to try and summarize from the books of Satra Corporation the amounts of expenses which the corporation had incurred either in New York through the corporation directly, the consultant corporation, or the industrial corporation, either in New York, Moscow or Vienna which could be directly related to carry out the contractual obligations between Satra Corporation and IBM.

THE COURT: Gentlemen, I have just gotten a note from the jury that they have reached a verdict which is good

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for all of us. I am sorry to interrupt your testimony but I will now recess this case and call counsel in the other case.

(Recess.)

THE COURT: Mr. Simon and Mr. Hellerstein, I have no desire to tell you how you should handle your case, but since this witness is associated with Satra, I was wondering, in view of Mr. Paterson's statement that Mr. Witham and some of the others are anxious to leave, whether we should hear them first or do I have to understand your witness' testimony before I can go on to the others?

MR. SIMON: I think it would be helpful to have the basic numbers in front of you.

THE COURT: All right.

MR. SIMON: One of my problems in this case has been that there has been an awful lot of talk about contracts and talk from lawyers and very little real dealing with the numbers because of the fact that we bifurcated the trial.

THE COURT: We are up to Defendant's Exhibit 3 which you were about to describe to us or started describing it.

THE WITNESS: I was asked to determine expenses incurred by Satra related to the IBM contractual obligations, and I reviewed the accounting records available for the

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various corporate entities which had to deal with the performance of those obligations and then prepared the schedule and broke down the schedule into the periods requested.

Q Would it be fair to say that to some extent at least these numbers are arbitrary and you simply had to guess or designate a fair percentage?

A I had to make certain assumptions as to what type of activities were carried out in different parts of the corporate offices and then apportion on an assumption basis which ones of those were related to IBM and which ones could be, under accounting terms, directly identified with fulfilling the contractual obligations. In that sense they are arbitrary.

THE COURT: Let me ask a question, if I might.

Are you talking about a situation in which, for example, somebody might have gone to Moscow for more than one client and you had to decide how much was attributable to IBM and how much would be attributable to somebody else? Can you give me an example?

THE WITNESS: On page two, you will notice the Moscow office. I broke down the total expense of the Moscow office for the total period involved. I then apportioned certain sums to the IBM contractual obligation based on the

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2 assumption that of the total personnel in that office certain
3 ones of them can be directly identified with IBM business
4 and others can be broken out.

5 THE COURT: All right.

6 MR. HELLERSTEIN: If your Honor please, we are
7 again engaged in an irrelevancy because we are never to
8 deal with actual expenses. The parties so agreed. The
9 parties agreed that the only expenses that would be
10 involved would be schedule expenses and the parties agreed
11 that way because Satra did not want to give Dr. Stern the
12 right to audit the books of Satra Corporation and because
13 perhaps of the very reason that Mr. Curtin should assign,
14 that any allocation would be arbitrary and an assumption.
15 I don't know why we are wasting our time on this.

16 THE COURT: What is the relevance of this,
17 Mr. Simon, in view of what appears to be undisputed schedule
18 arrangements set forth in Exhibits C and D?

19 MR. SIMON: Your Honor, this, of course, is the
20 core of what seems to me to be the dispute between the
21 parties and has been all along. The parties have an agree-
22 ment. The jury found they had an agreement, or at least the
23 jury found they tried to make an agreement which, I suspect,
24 is a little closer to the actual facts.

25 From that agreement the parties determined in

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Curtin-direct

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advance that the expenses which Satra would incur would be a minimum of \$100,000 a year and they agreed on that fact.

MR. HELLERSTEIN: That is not the case, your Honor. In fact, that was the contention that the jury specifically disavowed. And Mr. Hill argued to the jury --

THE COURT: Let me hear Mr. Simon's theory fully and you can answer it.

MR. SIMON: The parties agreed that \$100,000 of expenses would be incurred by Satra as what they believed a reasonable anticipation, admitting that it was arbitrary and admitting that they did not actually know.

I am perfectly willing to stipulate with Mr. Hellerstein that the original anticipation of \$100,000 a year was, in fact, reasonable at the time it was agreed on and has, in fact, been incurred. If that lies in the record and if we can agree on that fact, then I see no reason to proceed with this line. But it does seem to me that what the Court must now do is to say, "Okay, the parties have a deal, what kind of deal do they have?" And in view of that --

THE COURT: That I obviously will have to determine. That is not going to be determined for me by hearing how much of the expense of the Moscow office Mr. Curtin attributed to IBM as distinct from somebody else.

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Curtin-direct

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I am not quite prepared at this moment to say that I entirely agree with Mr. Hellerstein, although I must say that we are going into specific expenses.

At the same time I don't think Mr. Hellerstein disputes with any degree of seriousness that the general range or expense that you are talking about -- well, he says it doesn't have anything to do in the case. I would regret having to spend any considerable period of time listening to testimony about what the expenses are if at the very least, the real argument is whether they are chargeable or not chargeable and not how much they are.

MR. SIMON: I agree with you in this sense. If I think we all understand, as I think we all do now, that the expenses are, in fact, being incurred and that it would not thereby by fair were the Court to look into the equities to determine that the \$100,000 as anticipated in advance was a reasonable anticipation, and that the figure was substantially close to what the expenses really are, I am well satisfied to leave the line alone.

But I think it's up to us, under the circumstances where we have an agreement but we disagree as to what it means, to put before your Honor a reasonable interpretation of how these parties went into the deal, what the real facts are.

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Curtin-direct

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2 It is, in fact, these expenses in no small
3 measure which lead directly to the 1973 contract. The
4 fact that the expenses were being incurred in this amount
5 and that there were no revenues coming in, that seems to me
6 to be clearly material.

7 THE COURT: It may be material if the reason
8 for your entering into the December 1973 agreement are
9 material at all, then such material or such information
10 would be part of that.

11 I regret that I am not in a position to take
12 any more fixed attitude towards the questions that are
13 being raised today than I am, but my schedule hasn't
14 permitted me to think about these issues since you were
15 last before me. I haven't even tried to consider what the
16 meaning of the jury's verdict is as to the issues that are
17 being raised at the present time.

18 I don't know what the total of the amounts is
19 that you are going to be dealing with, but this seems to me
20 the way we should proceed, particularly in the light of the
21 fact that there are other witnesses here who are not any
22 longer anything but either bystanders or whatever it is.

23 That is, that I would hope the parties can agree
24 as to what amounts of expense were incurred, or
25 Mr. Hellerstein would say he would not contest evidence to

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Curtin-direct

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the fact that certain expenses were incurred, reserving,
as he has, on the record, the position that whatever the
expenses incurred were, is irrelevant.

MR. SIMON: I was going to suggest the same
thing and pass this witness.

THE COURT: That I think would be good. If you
can't reach that agreement, Mr. Hellerstein, then I think
we should pass it for the moment anyway and you can look
at these figures perhaps during the lunch hour and see if
there is a problem. If you can't agree that you would not
contest the figures if Mr. Curtin were to testify about
them, but that they are irrelevant, then I would still hope
to put the figure aside at the moment except for a range of
some kind and let me come to grips with the legal questions
involved and if I find it ever becomes necessary to hear
what Mr. Curtin's testimony is as to precise figures, I
can always do it.

MR. HELLERSTEIN: It's the last point that I
think I would except to, your Honor. If expenses were to
be important then there is a way to prove those expenses
and not by summaries. There is a best evidence objection
that applies so that I would have an opportunity to see the
precise data.

But I would be content for our exercise today

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Curtin-direct

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if Mr. Simon would just give a number as expenses, and I don't care if they are real or arbitrary, whatever.

THE COURT: He would offer to prove whatever the amounts are and let that offer to prove stand on the record to be used in such a way as, I believe, it is necessary for the time being. All right?

MR. HELLERSTEIN: I think that would be a good way of doing it.

MR. SIMON: To reiterate what you say and Mr. Hellerstein says, it's Mr. Hellerstein's position that the numbers are not material to the controversy before the Court but in the event your Honor determines they are material, they want the right to cross-examine and do whatever is necessary to prepare themselves for that examination.

It is our intention to prove today, and we make an offer of proof, that the numbers we will be admitting is an arbitrary range, as displayed on the first page of defendant's exhibit which Mr. Curtin has in front of him, and will amount for the period September 22, 1971 through September 21, 1972, to \$147,895.93 and in regard to the other time periods the numbers shown.

THE COURT: On the right hand column for the IBM portion?

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Curtin-direct

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2 MR. SIMON: That is our contention and we make
3 that offer of proof.

4 THE COURT: That offer stands and it stands
5 until the Court determines whether it believes that that
6 proposed evidence, alleged evidence, is material to the
7 case or is not.

8 MR. SIMON: Yes, sir. That is my understanding.
9 We will pass Mr. Curtin.

10 THE COURT: Thank you, Mr. Curtin.

11 (Witness excused.)

12 MR. HILL: We call Mr. Witham, your Honor.

13 (Defendant's Exhibits 2 and 3 were received in
14 evidence.)

15 THE COURT: All right. 3 is received for the
16 purposes of making clear what document Mr. Simon was
17 referring to, but it's not received as proof of the contents.

18 B E R T R A M H. W I T H A M, called as a witness
19 by the defendant, having first been duly sworn,
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HILL:

23 Q Mr. Witham, where are you presently employed
24 and what is your title?

25 A Presently treasurer of IBM Corporation.

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Witham-direct

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1 Q How long have you been associated with IBM?

2 A A little better than 13 years.

3 Q During the course of your association with IBM
4 have you become familiar with the contractual relationships
5 between IBM World Trade and Satra?

6 A Reasonably familiar, yes.

7 Q You have been directly involved personally in
8 those relationships to some extent?

9 A Yes.

10 Q You are aware that there was a contract entered
11 into between Satra and IBM World Trade Corporation in the
12 year 1971 with respect to certain services being rendered
13 by IBM, are you not, sir?

14 A Yes.

15 Q Did there come a time when within the IBM
16 organization consideration was given to changing the nature
17 of that relationship as established by the 1971 agreement?

18 A Yes.

19 Q Would you tell me what happened, what occasioned
20 this consideration of the change?

21 MR. HELLERSTEIN: Can I note an objection, your
22 Honor? I think it's all irrelevant.

23 THE COURT: I am not sure it is. I will receive
24 this.

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Witham-direct

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2 MR. HELLERSTEIN: So I don't have to keep on
3 getting up --

4 THE COURT: Your objection is to the line of
5 the testimony, yes.

6 A Perhaps it would be best if I started with the
7 concept of the original contract and how we came into it.
8 It was in December of 1971 when the corporation decided to
9 start entering or attempting to enter business relationships
10 in the Soviet Union. We had been doing business in most
11 of the eastern European countries for many years and got
12 quite active there in about 1967. The matter of how we
13 might enter the business in the Soviet Union was discussed
14 in-house.

15 We even talked to a man who later became an
16 advisor to us, the former Ambassador to Russia,
17 Mr. Llewellyn Thompson. I believe it was through him that
18 he suggested that we talk about the services of Satra.

19 This led to discussions with various people
20 from Satra and the idea was that based on our experience in
21 dealing with the eastern European countries, that much of
22 the business had been conducted on a barter basis rather
23 than on a straight cash basis and that one of the things
24 which we needed was a financing capability of providing,
25 that is, buying goods in Russia which would create the foreign

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Witham-direct

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exchange which would pay for the sales of our goods into Russia.

As a matter of policy, we did not like to be a party in handling those goods, but we normally deal with a third party and let them provide the foreign exchange. We understood that Satra and specifically Mr. Ara Oztemel had been working in Russia for a good number of years and basically the thing which was attractive to us, above all, was the matter that he bought a great deal of chrome and this chrome coming from Russia generated foreign exchange and, therefore, would be one of the offsets which would be used.

So at that time with the idea that we were going to do this business with barter we entered into this agreement with Satra and this would be an overall agreement. Generally speaking, if you do individual barter arrangements there is a commission which I will say ranges around seven, eight, nine percent, something like that.

Since we were going into an exclusive arrangement with Satra and that they were going to have the exclusive business with us in Russia we went and negotiated to a lower figure which was three and a half percent of the overall business that we were doing in the Soviet Union for all the data processing.

1 jqd

Witham-direct

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2 I think it was later modified for some of the
3 office products, typewriter business we would do over there,
4 and there is a different schedule on that. I believe
5 seven percent.

6 Included in the three and a half percent was the
7 agreement that Satra, through their expertise, would provide
8 us with various administrative services. That is, provide
9 us with office space as needed in Moscow to set up the
10 matter of visas, transportation, appointments. All of this
11 was done, as I say, in August and September of 1971 in
12 anticipation of our displaying a Model 50 computer, the
13 360 line at the Leningrad Fair in October of 1971.

14 The contract was agreed to and entered into at
15 that point.

16 Not long after that, somewhere around along
17 November, some of us within the corporation were a little
18 bit concerned in that we were getting reports that Satra
19 was representing itself as being an agent or representing
20 IBM in Russia, which was not the case at all.

21 We don't particularly like to have people
22 represent us. They provide a service for us but we
23 represent ourselves.

24 Q When you say "as an agent," you mean representing
25 you as a sales agent?

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Witham-direct

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1 A This type of thing, "we speak for IBM in
2 Russia," and that was not the case, and it disturbed us.
3
4 I was in Moscow with a business international group the
5 following month, in December of 1971 and other businessmen
6 that were in that group made comments to me, "Well, I
7 understand Satra represents you here in Russia," and I
8 said, "They do not represent us here in Russia. They have
9 provided certain services to us and we do have a contract
10 with Satra."

11 When I returned from Russia I asked one of my
12 people, Mr. Hendricks, who I believe was here in this Court
13 at one time --

14 THE COURT: He has been referred to.

15 Q His name has been referred to.

16 A I believe he contacted Mr. Oztemel or one of
17 his people. Mr. Oztemel does travel quite a bit. He
18 pointed out this problem. This continued on into the spring
19 of 1972 and this was acknowledged. But we were a little
20 concerned about it, a little unhappy about it. We made that
21 known. We sold the first order, a Model 50 that went to the
22 Chemical Ministry. We did obtain the export license. It
23 was installed and contrary to what we had anticipated
24 originally, they paid cash on the barrelhead, that expression,
25 rather than a barter.

1 jqd

Witham-direct

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2 As we continued to deal with Russia we found
3 that no mention was ever made of barter. It was always:
4 as this is something else we can talk about, bank financing
5 or something like that, but never barter, which started
6 giving us second thoughts as to the agreement which we had
7 in Satra which gave a three and a half percent override
8 on everything we did there in anticipation that we were
9 going to be using that as basically commission for barter.
10 But now there was no barter so we had a second reason why
11 we weren't that happy with that contract.

12 But it was a binding contract. We could not get
13 out of it until September 1974 and then only if revenues
14 would not exceed an annual rate of \$50,000,000 per year.
15 It appeared to us at that point in time, summer, fall of
16 1972, that we were never going to reach \$50,000,000 annual
17 revenue from our business in Russia prior to the time of the
18 1974 notification date.

19 Q This was an IBM judgment?

20 A Yes, an IBM judgment.

21 THE COURT: You concluded that you would have
22 been able to cancel in September 1974?

23 THE WITNESS: Yes. We didn't think we would
24 get to the point of \$50,000,000 annual revenue. In all of
25 our proposals, and there were proposals being made during

1 jgd
2 this period of time dealing with the Kama River project,
3 the big truck factory which involved \$100,000,000 or better,
4 several in petrochemicals, several in the petroleum
5 industry and so on, our people then that were in charge of
6 the Russian operation, specifically a Mr. Degnan, at one
7 point in time, started raising questions and concern about
8 the service we were getting from Satra.

9 I guess as a follow-on to that I asked for a
10 specific listing of the services which Satra was providing to
11 IBM personnel in Russia to get a sort of feel of what was
12 going on. This was provided to me and I think it covered
13 the period January and February of 1973. I was somewhat
14 amazed by the amount of services that were being provided.

15 This was conference rooms, seminars, translators,
16 meeting people at airports. It was a tremendous amount of
17 activity.

18 Q Was this information furnished to you in writing,
19 sir?

20 A It was furnished to me in writing by Mr. Ralph
21 Stafford, who at one time was an employee of ours but who
22 was then an employee of Satra. I asked him specifically for
23 that information.

24 MR. HILL: May I have this document marked.

25 (Defendant's Exhibit 4 was marked for

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Witham-direct

2 identification.)

3 Q Mr. Witham, I show you a document which is on
4 the letterhead of Satra Industrial Corporation, dated
5 February 21, 1973 and I will state for the record, your
6 Honor, this is a document covered by the stipulation between
7 IBM, ourselves and the plaintiff, and ask you if you can
8 identify that document.

9 A Yes, this was a document which I was referring
10 to.

11 THE COURT: The one Mr. Stafford furnished?

12 THE WITNESS: Yes, Mr. Stafford had furnished
13 this to me.

14 MR. HILL: I would like to offer the document
15 at this point.

16 THE COURT: Subject to Mr. Hellerstein's continu-
17 ing objection, that is received.

18 (Defendant's Exhibit 4 was received in evidence.)

19 A This gave me the idea that perhaps Mr. Oztemel
20 or Satra might not be as happy with our contractual arrange-
21 ment as perhaps we were because he was expending obviously
22 considerable sums of money and we were not generating the
23 business on which he would get commissions.

24 I thought perhaps there might be quid pro quo
25 if we could come to a meeting of the minds and perhaps we

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Witham

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ought to work out a different kind of an arrangement.

At my request Mr. Oztemel had lunch with me. I believe Mr. Hendricks was with us at the time. I believe there were three of us at the University Club. This would have been in the spring of 1973, probably early April. And I suggested to Mr. Oztemel that maybe the contract which we had was not mutually advantageous, that the situation was quite a bit different than what we had originally anticipated and that we should take a look at a new kind of arrangement which would be fairer to him in the long run and perhaps fairer to us, the concept being, which I suggested to him at that time, that on the services which he would provide in Moscow with the types of things that I referred to earlier and are listed in that document, that we might do that on a cost reimbursement basis. That he would document the cost and we would add a 20 percent override for profit or something like this.

THE COURT: Cost plus?

THE WITNESS: Yes, cost plus, so he wouldn't be anything out of pocket. And that on the barter transactions, if and when they came about, that this should be done on pretty much of a first refusal basis. He would have the first crack at it and then we would negotiate a fee after that.

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Witham-direct

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Mr. Oztemel agreed that from his standpoint that the contract that we put together and signed back in September of 1971 was not to his liking either, that we should work for a different arrangement. So we agreed that we would exchange basically new proposals.

Mr. Oztemel sent me a letter some time after that in which he proposed really more of a joint venture which would involve a great deal of purchasing in Russia which would require financing basically from us to the tune of \$4,000,000, either from the standpoint of equity in a joint venture or a straight loan to this new venture.

This really was not to our liking and we countered with a contract proposal to Mr. Oztemel that probably would have been early June of 1973 which basically said we would like to make sure that you are not an agent and specify that.

That we would reimburse you for expenses plus a profit on those expenses, and that you would go with the right of first refusal on any barter arrangement.

This was basically the way the thing started and negotiations went back and forth and actually on many of those negotiations I was not a party to it and it was handled by our general counsel, Mr. Farr, and I believe also Mr. Hendricks was also involved in the detailed

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Witham-direct

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negotiation. I was out a good deal of that time travelling. That is the way we ended up with this.

Finally the second contract, the concept being instead of one overall umbrella, that there would be basically a fee which was an all-inclusive fee rather than the cost plus basis. Mr. Oztemel, I believe, was the one who suggested this. I was not present at the time.

It would be an all-inclusive fee for his services on a continuing basis. It was not a fee which, as far as I could tell, was ever very scientifically arrived at through any mathematical formula. It was suggested there would be a fee somewhere in the vicinity of 200 to \$250,000 a year based on past efforts, I guess, and what we might expect in the future.

At one point in that negotiation, I think it was practically the final one, it was pointed out that under the terms of the 1971 contract that we owed or would owe to Satra the commissions on another order which we had obtained. It was an order for a Model 158, a very large system, as a reservation system for Intourist. It was in the amount of \$10.5 million.

Q This is for the airline reservation service?

A Intourist. We never got an airline reservation order, I am sorry to say.

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Witham-direct

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But this was pending and was always subject to export license controls. In fact, as of right now it still is pending waiting export license from the United States.

Q IBM has never furnished that equipment?

A No.

THE COURT: It was pointed out to you that if the deal were consummated you would owe something to Satra?

THE WITNESS: Under the terms of the 1971 agreement we owed money to Satra. Mr. Oztemel suggested at the time because he had incurred a loss of expenses on our behalf that if we wouldn't object too much he would like to add that in as a part of the monthly fee to the monthly fee or monthly retainer, all-inclusive fee which we were agreeing to under this new contract.

So basically then it was written into the contract on the payment -- I guess there are really three pieces which would involve payment. One is the continuing payment per year which was \$200,000 per year.

THE COURT: \$16,000 per month?

THE WITNESS: Yes.

Q That is payment for the services rendered?

A This was the all-inclusive fee that Satra would pay to us for providing all of the services which he had been providing us in Moscow, that is, hotel rooms,

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Witham-direct

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reservations, visas, meeting us at the airport, translation services, a myriad of things. Also that included his consulting service which is his expertise in knowing Russia and knowing the Russian market, these types of things.

It was an all-inclusive payment to Satra on a continuing basis for the life of the contract which went up through 1976. Mr. Oxtemel had suggested at one of those that we pick up this Intourist commission, three and a half percent on \$10.5 million and treat it as sort of an advance and that is the way it was written in the contract. We would start paying on that commission although we had not received payment in Russia.

Q In any event, that transaction is not closed and if you don't receive payment, does Satra have an obligation to refund that money?

A Yes. If something happens and the United States Government turns it down and it cannot be exported by the terms of that contract we have a claim to come back against Satra to be reimbursed for all moneys that we have given to them.

The third piece which involved payment was still sort of prospective and that would be on any type of contract which would involve barter or other types of financing.

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Witham-direct/cross

2 Any time the Russians would say that, "Where do
3 we get the foreign exchange to pay for your computers,"
4 then under the terms of our agreement we were to turn that
5 over to Satra and Satra was to provide that kind of service
6 on any type of barter arrangement. This is how we came
7 about to the second contract.

8 MR. HILL: I have no further questions of
9 Mr. Witham.

10 THE COURT: Mr. Hellerstein.

11 CROSS-EXAMINATION

12 BY MR. HELLERSTEIN:

13 Q Under the original deal between IBM and Satra
14 was it the case that the consideration for the administrative
15 consultative and financial services that Satra was to perform
16 for IBM was the commissions on sales that IBM agreed to pay
17 to Satra and the \$50,000 characterized as an advance against
18 commission and as a retainer?

19 A Under the terms and in the way that I understood
20 it, the three and a half percent commission was to be an
21 all-inclusive payment. All services except if they bought
22 us airline tickets, straight out of pocket things like that.
23 The \$50,000, I presume you are talking about the advances
24 that we made early in the game, I believe in 1971, the fall
of 1971?

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Witham-cross

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Q Yes, October and December.

A We made a couple of payments as advances in anticipation of the commission which would be payable on the 360, Model 50, which we sold to the Chemical Ministry in the Soviet Union.

Q Those were sales out of the Leningrad Fair?

A Yes.

Q So, in other words, the \$50,000 that was paid to Satra was treated as an advance against the commission that would have been payable to Satra as a result of those sales of the IBM machine?

A That is the way I recall it. Again recognizing that Satra was spending money on our behalf and that it would be perhaps two or three months or four months or five months before we actually installed the equipment and received payment.

Q As I understand it, and correct me if I am wrong, Satra was not billing you for the expenses generally incurred in servicing the IBM contract. It was to devote those services and look to the commission revenue to be paid.

THE COURT: Except for out of pocket expenses.

MR. HELLERSTEIN: That is right.

A That is right.

Q Those services were administrative, financial,

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Witham-cross

2 consultative, and whatever?

3 A Yes. It included even services over on this
4 side, for example, because Mr. Oztemel and other of his
5 people arranged for escorting some of the Russian groups
6 when they were over, such people as Mr. Patolichev,
7 the Foreign Trade Minister, Mr. Alkhimov, Mr. Andreyez
8 and Mr. Sushkov; all the people involved in the top level
9 negotiations here and Satra then did a lot of the escort
10 work with them and made sure that we had opportunities to
11 talk with them and basically carry on our marketing
12 activities.

13 Q Does IBM have any negotiations going on looking
14 for a possible sale of data processing equipment to Russia
15 at the present time?

16 A Yes.

17 Q Would it be fair to say that the amount of
18 dollars in those sales would be in excess, if the
19 negotiations were successful, of \$1,000,000?

20 MR. HILL: Objection. I don't know what kind
21 of relevance that kind of speculation would have here.

22 THE COURT: Overruled.

23 THE WITNESS: I couldn't even tell you. The
24 contracts are things which we are bidding on or involved in.
25 They range over a whole spectrum.

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Witham-cross

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THE COURT: Give us some idea of the scope.

THE WITNESS: The Kama River one could run as high as \$100,000,000. It involves selling a lot of not only the hardware, the equipment, but it's basically a lot of services where our systems engineers would actually be designing a lot of systems which would go into the foundries and this type of thing.

There is a reservation system which I believe has been proposed. It has been discussed. I can't tell you the amount on that. I guess it would be similar to the Intourist system but this was for Aeroflot. There are discussions --

THE COURT: Could you give us an order of magnitude in that?

THE WITNESS: I can't.

THE COURT: You said the Kama River, Intourist was \$10,000,000?

THE WITNESS: Yes. Aeroflot might be the same. There is an air traffic control proposal that has been discussed which is basically the same as the FAA system here. That is what they were talking about. At one time that was talked about in turn with us acting as prime, and many subcontractors. This could have totalled somewhere with all the subcontractors probably somewhere in the

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2 vicinity of \$150,000,000.

3 But that would be all the various prices of
4 people making radars like Westinghouse, Raytheon, Sperry
5 and so on.

6 Q If you had not made the December 1973 agreement
7 with Satra and one or more of these negotiations became
8 successful before September 30, 1974 -- before September 21,
9 1974, I take it that IBM would possibly have owed a commission
10 to Satra measured by that three and a half percent?

11 A If we had signed a contract, according to the
12 way I would interpret the contract, if we had signed a
13 contract with the Soviet Union for any one of those, Kama
14 River, Aeroflot, what-have-you, then under the terms of the
15 contract which we had with Satra then we would have owed
16 them a commission of three and a half percent on the total
17 value of each one of those contracts.

18 Q Now because of the replacement contract of
19 December 1973 I take it that that three and a half percent
20 commission is no longer in effect, at least to your under-
21 standing?

22 A That is correct, three and a half percent com-
23 mission would not be in effect. No commission would be in
24 effect unless there was a barter transaction involved and it
25 could be seven percent.

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Witham-cross

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Q That would be an ad hoc basis?

A That is right, subject to negotiations.

Q Instead of that three and a half percent commission I take it that you now have a different method of compensating Satra for the administrative and consultative and financial services that you expect from it?

A This was the \$200,000 a year all-inclusive payment which is supposed to take care of everything.

Q Would it be fair to characterize those payments as a retainer for Satra's services?

MR. HILL: Objection. I think I have already made this point earlier.

THE COURT: I will sustain the objection there.

MR. HELLERSTEIN: I am not interested in the legal terminology now, your Honor. I'm interested in what the businessman's knowledge of these payments was.

THE COURT: I will allow you to ask the question in case I become dissuaded that it's relevant. At the moment I am not.

MR. HILL: I don't see how this witness could make a statement that would be binding on the defendants in this action.

THE COURT: I don't know that it would be, but I will hear it.

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Witham-cross

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Go ahead with the question.

What is your understanding as a businessman as to what Mr. Hellerstein asked you?

THE WITNESS: A payment containing eight monthly payments for him to provide basically all the services on demand that we require, for him to provide the advice, counsel, which he has the expertise in.

THE COURT: You never talked about what it should be called?

THE WITNESS: It's just an all-inclusive fee, a monthly fee we were paying.

Q Mr. Witham, yesterday you were interviewed in your office by Mr. Hill and Mr. Simon and Mr. Fisher at the same time.

A Yes.

Q I wonder if you would tell the Court the way you expressed your understanding of what this fee was? How did you regard it?

MR. HILL: I object to this, your Honor. This was done yesterday afternoon as a cooperative effort to prepare Mr. Witham to come down here. There was no record kept.

I suppose some of the lawyers managed to take notes. I don't know that these notes have much bearing or whether they are relevant on what the witness now remembers

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happening yesterday afternoon. Indeed, when this whole procedure was suggested as an effort to come in with Mr. Witham, who is not a party to this action, to get gymmed up on the facts and refresh his recollection.

I made a point that, one, he hadn't had to prepare even for the interview and that we ran a very real risk of, on cross-examination or indeed even on direct examination, having the lawyers try now to put back into Mr. Witham's mouth what they think he may have said or didn't say.

I must say that I am not sure this is really a legal objection. It seems to me rather unfair to the witness.

THE COURT: I don't think it's going to be embarrassing if Mr. Witham used a word yesterday when he was talking about it and uses a different word today and gives me a feel of the situation, if it's relevant and if it's binding, and I will give you some comfort, Mr. Hill, by saying that I am rather on your side with regard to those questions.

But let's hear what it is you want to ask.

A I thought about the same thing. I may have used some different words on the thing. I don't think my understanding is any different as I have expressed it now with what I expressed yesterday afternoon.

I guess I could have called the thing almost any-

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Witham-cross

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1 thing, a fee --

2 THE COURT: You were thinking in terms of
3 retainers?

4 MR. HILL: Yes, we do, your Honor.

5 THE COURT: It sounds fancier and it's money up
6 front.

7 Q Did you call it a fee?

8 A I could have called it a retainer fee. It's an
9 all-inclusive fee as far as I'm concerned, to pay for services
10 that we anticipated asking Satra Corporation to provide to us.

11 Q I didn't precisely catch your direct testimony.
12 You referred to some arrangement on a cost reimbursement
13 plus 20 percent fixed fee arrangement. Who was it who
14 suggested that, IBM or Oztemel?

15 A I think I suggested it to Mr. Oztemel during our
16 first luncheon, the way I recall it. And it actually had
17 come from some of our people in-house.

18 Q Did IBM ever go into the cost that Satra said it
19 was incurring in the servicing of IBM?

20 A Not to my knowledge.

21 Q With respect to the services that were withdrawn
22 in that submission that Mr. Stafford made for you --

23 THE COURT: Services that were withdrawn?

24 MR. HELLERSTEIN: I will put it again. I wanted
25

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Witham-cross

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to withdraw a partial question.

MR. HILL: May I ask Mr. Simon to voice our objection to this. It goes directly to the very issues raised in connection with the exhibits that Mr. Simon put into evidence.

MR. SIMON: Your Honor, I call the Court's attention to the fact that the Satra Corporation has proffered for the Court's review its actual expenses which was accepted by the Court. Under the circumstances that if the opposition wished to question it whatever, they would have an opportunity to do so, but I note for the record that if Mr. Hellerstein wants to pursue this line on cross-examination it seems to me we should have an opportunity to take the exhibit and ask the witness what it covered and what his anticipations were and so forth.

I had understood the Court didn't want to continue on that line. For that reason I object to the question.

THE COURT: I will ask Mr. Hellerstein whether he is asking about the same kinds of things that he said earlier they were irrelevant.

MR. HELLERSTEIN: I think I am, and since the point was raised on direct I wanted to ask them, but they are not terribly crucial questions.

THE COURT: I prefer to stay away from the

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Witham-cross

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questions of expense.

MR. HELLERSTEIN: All right.

Q In any event, Mr. Witham, is it accurate that in the various drafts that IBM submitted to Satra that the provisions that were made was not for a cost plus arrangement but for a flat monthly fee arrangement, is that correct?

A I can't answer that directly.

THE COURT: That is where it ended?

THE WITNESS: No, sir, I think he ended up with cost plus.

MR. HELLERSTEIN: I will put the question again.

Q Is it the fact that in the various drafts that were submitted by IBM to Satra the compensation arrangement that was proposed by IBM was a flat monthly fee and not a cost plus arrangement?

A I can't really address that because I don't know that I saw every one of the drafts.

THE COURT: Whoever is listening, I really can;t say that this is important. I know what your objections were.

MR. HELLERSTEIN: Thank you, Mr. Witham.

THE COURT: Anything further, Mr. Hill?

MR. HILL: No.

THE COURT: Thank you.

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Witham-cross

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(Witness excused.)

MR. PATERSON: Could I have a moment, your Honor, to confer with IBM counsel to see whether there is anything they would like stated for the record?

THE COURT: Yes, you may.

MR. PATERSON: We have nothing.

MR. SIMON: It would be our position to call Dr. Stern as an adverse witness and rather than be involved with a short examination now, it might suit the witness to recess for lunch.

THE COURT: You don't have any further IBM witnesses?

MR. SIMON: No.

THE COURT: I would like to hear what Dr. Stern is going to say for himself too.

If you want to do it that way, we will adjourn now and come back at a quarter of two.

I do want to say this: I expect to end by five o'clock this afternoon.

MR. SIMON: I don't think it will take any longer than that.

MR. HILL: Can I give to the law clerk on or off the record the citations I referred to this morning?

THE COURT: Sure, whichever way you prefer.

(Luncheon recess.)

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2 AFTERNOON SESSION

3 (2:00 p.m.)

4 THE COURT: Dr. Stern, I gather you are being
5 called.

6 MR. SIMON: Yes, sir.

7 THE COURT: Dr. Stern, I remind you that you are
8 under oath.

xvx 9 M A R V I N S T E R N, called as a witness on behalf of
10 the defendant, having previously been duly sworn,
11 resumed and testified further as follows:

12 DIRECT EXAMINATION

13 BY MR. SIMON:

14 Q Dr. Stern, as an overview of the contractual
15 negotiations leading up to the August 31 contract, I take it,
16 do I not, that it was your intention to be a joint venturer
17 or partner as opposed to an employee?

18 A That is right.

19 Q And that the words "joint venturer," where they
20 appear, and "partner," where they appear, were put in at your
21 instance because you wanted to avoid categorization as an
22 employee?

23 A That is partly right.

24 THE COURT: Are we referring to specific documents?

25 MR. SIMON: I am going to, your Honor.

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THE COURT: That may be better.

Q Going from the general to the specific, Dr. Stern, it is a fact, is it not, that you prepared what has been introduced and received as Plaintiff's Exhibit A?

A That is right.

Q Dr. Stern, in Plaintiff's Exhibit A which was, as I understand it, the first written effort to formalize your negotiations with Satra, it is stated in paragraph two that whatever benefits are derived from these efforts will be shared equally by the partners, is it not?

A Yes, sir.

Q And that language was of your choice?

A Yes, it is.

Q That concept of joint venturing or partnership was carried forth at your request through Plaintiff's Exhibit B and C, was it not?

A The concept, yes, with some very minor modification which might be significant.

Q I appreciate that and that is why I told you in the beginning this is an overview. We are not talking about peculiar semantics. Do we understand each other?

A I am not talking about semantics. I am talking about in paragraph one of Exhibit A I also used the words "their joint best efforts." Those words I also used in

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Exhibit B which I was involved in. Exhibit C, which was offered to me, left those words out.

Q You are commenting now that the words "joint best efforts" are not involved in Exhibit C, is that correct?

A Yes, sir.

MR. HELLERSTEIN: Objection to the form. They are not in it. The question of involvement is something different.

THE COURT: All right.

Q As joint venturer or partner -- and I will tell you now that I will use those terms interchangeably -- was it not a fact that you accepted the risks of the venture? If it was good you shared, if it was not, you lost?

THE COURT: You mean lost in the sense of actually having an out of pocket loss or not getting anything?

MR. SIMON: I am going to get there. We are trying to get an overview of what his concept was.

A I took a certain risk and we would have to define what the risk and what the losses were but otherwise, yes, you are right.

Q So where it states in the exhibits that you were going to share in the benefits, you were likewise to at least some extent committed to the idea that you might have to share

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in the detriments if there were detriments?

MR. HELLERSTEIN: I object to the form. I appreciate this is an overview but by Mr. Simon pressing the questions you are leading the witness to a lot of legal conclusions which may be beyond what he was originally thinking of doing and is certainly beyond what he and Mr. Oztemel and others in Satra were stating they were doing. It seems to me they are both irrelevant and objectionable.

THE COURT: I won't accept the testimony of Dr. Stern as a legal conclusion. I have not determined, and you will have to determine hereafter, the extent to which I think that the attitude, if you want to call it that, or the concepts or the views of either of the parties towards what their contract meant is controlling indicates as it now stands. But the thing I have not yet determined is that I will hear what Dr. Stern thought was on the negative side for him, as well as what he thought was on the positive side.

MR. HELLERSTEIN: Since I broke into the testimony I gather Mr. Simon is going into the question of mitigation of damages which has been briefed by your Honor. I want to state my objection to the line of testimony on that point. I understand your Honor's ruling.

THE COURT: I think it would be better to characterize it as asking the witness what he thought would be

1 jqd
2 possible -- at least I want to assume his concept -- what he
3 thought the risk of loss was and not just leave it hanging,
4 that there might be losses because that word can be construed
5 in a lot of different ways.

6 MR. SIMON: If the Court please, I will respond
7 only by saying that we have been engaged in a long trial
8 and we are all of us too familiar with the record, but I am
9 going to try to get from this general overview of joint
10 venture or partnership, if you will, to what specifically
11 was meant by it.

12 Q Dr. Stern, what were --

13 MR. HELLERSTEIN: One more thing here. I take
14 it that we are involved here not in a review of what the
15 jury has decided was the agreement but somehow related to the
16 questions that are involved here, namely what the damages
17 are under this jury verdict.

18 Mr. Fisher, I gather, understands his testimony
19 a different way from what I understand what Mr. Simon was
20 driving at. I gather that we may be involved with issues
21 that are extraneous.

22 THE COURT: Let's let Mr. Simon proceed subject
23 to motions to strike and objections to the questions. I
24 wouldn't be authorized to redecide what the jury has decided.

25 MR. SIMON: If we can have a little running room

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we can get to something.

Q Dr. Stern, I notice that the beginning exhibit said you were going to share the benefits. It did not say anything about the detriments that you testified you assumed some risk. My question now is what risk did you assume?

THE COURT: By virtue of which document?

MR. SIMON: The August 31, which, as I see it, was the culmination of these series of negotiations.

THE COURT: If everybody agrees, yes.

A I was risking becoming a partner with a firm who had already, in my eyes, displayed marginally ethical conduct.

Q Would it be fair to state that because of this marginally ethical conduct you were risking sharing in the loss if they got sued for it, as strictly by hypothesis, if IBM sued them for misconstruing their role in Russia?

A No.

Q What risks did you assume, Dr. Stern?

A For better or for worse I get by on having a certain of perhaps some capability, some integrity, what-have-you, and basically I was in the field of providing consulting advice.

My reputation fundamentally is my stock in trade.
Have I answered you?

Q Yes.

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2 Follow that for a moment. Your reputation, that
3 is. That which you can truthfully tell people you are
4 knowledgable in is your stock in trade?

5 A That is not quite it. To give an example, I
6 have been honored that if I want to speak to someone he will
7 usually see me because he knows I would not be kidding him.
8 I would not be wasting his time. That is what kind of repu-
9 tation I mean.

10 Q Is it not a fact that, for example, in soliciting
11 business as a consultant, you would very logically tell your
12 prospective employer that you were knowledgable and
13 experienced in Soviet affairs or something like that?

14 A No, that isn't the fact at all.

15 Q So that is not the type of reputation you were
16 talking about?

17 A No.

18 Q Is it your understanding, Dr. Stern, that under
19 the agreement you made with Satra Corporation you were
20 entitled to profits even though they suffered losses?

21 A We are speaking now about Exhibit C?

22 Q Yes, sir, as a partner.

23 MR. HELLERSTEIN: I object, your Honor. This is
24 calling for a legal conclusion.

25 THE COURT: Mr. Simon, I don't really understand

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what this has to do with the question of damages. Will you either, at the side-bar or otherwise, explain to me what you are trying to establish?

MR. SIMON: I am trying to establish that Dr. Stern was a joint venturer or partner by his own admission which seems to me he was. In the interpretation of the agreement the Court must bear in mind that it should be fair and equitable as between the partners. That is all.

THE COURT: I don't see what difference it makes what he thought about that. That may be a good argument but if it's a good argument it doesn't depend on whether Dr. Stern thought he was going to get profits when they got losses or not, does it?

MR. SIMON: I believe it does. I believe it applies directly to the issues of how the expenses are allocated. It's our position that throughout Satra was entitled to a fair break no matter which way it went. I am asking whether he had any other interpretation.

MR. HELLERSTEIN: Our job is to construe a contract and not to deal with general amorphous notions of what is fair and equitable.

THE COURT: Yes, I do, too, except to the extent that in construing the contract there may be presumptions that people intend to act in a certain way which may be

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2 considered fair and equitable, but not just because it's
3 fair and equitable. If I decide that the parties intended
4 to act in some other way that is that.

5 MR. HELLERSTEIN: I would accept that. This is
6 the point. The point is to draw up a schedule of incremental
7 annual revenues and annual expenses. The jury has decided
8 that has to be interpreted in a certain way and that was a
9 material part of the contract, that there was a contract.

10 It's now not up to any one of us to say that
11 that was not fair or not equitable and not to argue it one
12 way or the other.

13 I think it's fair and equitable and Mr. Simon
14 may think not. We think it's irrelevant.

15 MR. SIMON: Let me state of record that I do not
16 think the jury's verdict necessarily means that the contract
17 must be interpreted exactly as Dr. Stern or his lawyers do.

18 THE COURT: I want to make it clear that I haven't
19 studied the jury's verdict with reference to this question so
20 as to come to a conclusion as to whether this verdict
21 necessarily decides the question as to how the expense clause
22 or schedule is to be interpreted or whether it merely is to
23 be interpreted to mean that there was an agreement of the
24 parties on that point.

25 The latter the jury clearly decided. They clearly

1 jgd

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2 decided that they had an agreement.

3 MR. SIMON: Your Honor made that statement from
4 the bench several times as well as in the charge. The jury
5 might well decide the agreement covered such points to con-
6 stitute a meeting of the minds and where they didn't agree
7 it wasn't material. That is a matter of interpretation.
8 We now have a contract and the Court must interpret it.

9 THE COURT: Mr. Hellerstein, so we don't go on
10 this way, which isn't very productive and I know you want to
11 be productive here too, fortunately, and very fortunately,
12 I think this is a non-jury proceeding. There are a lot of
13 tricky questions here and they are going to require reflection
14 from me and if you people want further reflection in which
15 after today's proceedings you want to give me further thoughts
16 of your own, I will be glad to receive them.

17 I think the best way to proceed is for everybody
18 to make clear on the record what his position is as to what
19 the significance of the proceedings so far are and where we
20 are at and what I ought to look at or what needs to be proven.

21 But I think that having done that, Mr. Simon or
22 the defendants, and I say it only because the plaintiff
23 doesn't wish to give them in a group, should be able to put
24 in such proof as they wish, subject to any objections or
25 motions to strike so we can move along.

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2 MR. SIMON: If the Court please, in my experience
3 this is a trial before the Court and it goes without saying
4 that your Honor will disregard any portion of it which is not
5 material.

6 Q Dr. Stern, what expenses, as you viewed it on
7 August 31, were to be covered under the agreement figure of
8 \$100,000?

9 MR. HELLERSTEIN: Objection to the form of the
10 question. I don't think there was any testimony that Dr.
11 Stern had or anybody else had that it was an agreed figure
12 of \$100,000.

13 THE COURT: The figure referred to in the
14 schedule is \$100,000.

15 MR. SIMON: We are not going to be able to pro-
16 ceed if we are going to argue over each one of the questions.

17 THE COURT: I corrected the form of that.
18 Repeat the question.

19 Q In the schedule attached to what was received
20 in evidence as Plaintiff's Exhibit C, which is the contract
21 dated August 31, 1971, there is a schedule with an incremental
22 expense factor of \$100,000.

23 A Yes, sir.

24 Q What expenses would that cover?

25 A That schedule was arrived at in lieu of actuals.

1 jqd

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2 I have said that several times here before even to the point
3 of raising my voice and getting reprimanded for it.

4 THE COURT: We understand that, Doctor. We
5 know it was in lieu of actuals. But how was it to work?

6 Q The first question is: what was it to cover?
7 That is the testimony is very clear, the parties had a dis-
8 cussion about the fact that Satra would necessarily incur
9 expenses. They then had a discussion about whether or not
10 it was feasible for Dr. Stern to audit those expenses.
11 Satra said it was not, Dr. Stern agreed, but my first
12 question, the threshold question is: what were the expenses,
13 not by number?

14 A I shall answer that, thank you.

15 In lieu of actuals the agreement was we would
16 establish beforehand an expense reimbursement schedule to be
17 a function of revenues.

18 THE COURT: Dr. Stern, I know this from the
19 testimony and I think we all do. I don't think this is
20 responsive to the question.

21 The question is: what kind of expenses did you,
22 or what kind of expenditures -- put it that way -- do you
23 understand the agreement to have covered as expenses which
24 would fall or be covered by this?

25 THE WITNESS: I thought I answered that earlier

1 jgd
2 when I testified to the discussion Mr. Oztemel and I had
3 and the reason why he added at the end of the agreement that
4 the retainers would not be subject to the extension schedule
5 but would be divided 50-50 and the rationale which I am sure
6 I offered was the following --

7 THE COURT: Can't you tell me in so many words
8 what kind of expenses?

9 THE WITNESS: The expenses were those that were
10 to be associated with the actual sales and the commissions
11 thereon. Those were the future income items. That is why
12 we agreed. The current income items, namely retainers or
13 advances, aren't under the schedule.

14 Q I am going to interrupt you.

15 You can say that as many times as you want and
16 the court reporter will write it down, but the question is:
17 what categories of expenses were covered in the negotiations
18 which led up to the figure of \$100,000?

19 THE COURT: Let me try and make it easier.

20 As I understand Mr. Simon's question, and if I
21 understand it correctly, I consider it proper and I do not
22 consider it has been completely answered in any way.

23 It would relate to the kind of testimony that we
24 heard from Mr. Witham when he was talking about the kinds of
25 expenses in his new agreement that would be covered. What

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kind of expenses did you interpret your agreement to cover?

THE WITNESS: My understanding was that that expense schedule was associated with some kind of expenses that Satra would have with barter which would be associated with actual sales; that to be distinct from current income.

THE COURT: Supposing they maintained an office in Moscow which might have something to do with barter, it might have to do with a lot of other things, consultation, introducing somebody to somebody else, and they had a phone bill and this and that and the other. Are those the kinds of expenses that you understand were covered -- not covered, but I understand it didn't relate to actuals, but that this was in lieu of?

THE WITNESS: I can agree with part of what you said, not all. I am sorry.

THE COURT: You don't have to agree with what I said. Just tell me what you think.

MR. SIMON: Let me go down list by list.

What about hotels, hotel rooms?

MR. HELLERSTEIN: Let's let one question be answered first.

A I will answer the hotel office. I will answer that specifically. Satra in 1971 did not have an office in Moscow. So I don't understand the question.

1 jqd

2 Q This was a long term contract and the question
3 would make sense if they opened an office the following year.
4 The question would be whether that was the kind of expense
5 in lieu of which this incremental clause was supposed to
6 operate.

7 THE WITNESS: I really think you are asking me a
8 question beyond my capability of answering. My interpretation
9 was distinct from current, the retainers or advances which
10 would take care of the administrative expenses, as distinct
11 from those things the expense schedule was applicable to
12 efforts that Satra would have associated with barter to
13 actually convert the sale to western currency. That was my
14 understanding.

15 Q All right, Dr. Stern.

16 Mr. Reporter, I apologize because I don't know
17 your name, but would you read back slowly the witness'
18 answer to that question.

19 (Answer read.)

20 Q Is it your position that Satra would recoup
21 these administrative expenses from the retainers?

22 A Their share of the retainers, their half of the
23 retainers they would use however they want. I don't know
24 how they would use them.

25 Q Now, sir, let me be sure I understand. You are

1 jqd

2 saying, are you not, that the administrative expenses were
3 such things as the hotel room, the translators, the travel
4 service, and what-not?

5 MR. HELLERSTEIN: If your Honor please, I object.
6 The witness in all these series of questions is being asked
7 to interpret the agreement which is not what I think he
8 should be asked to do. Dr. Stern said he is being asked that
9 beyond which he is capable of answering.

10 THE COURT: If he wants to stand on that answer
11 alone, if you mean he doesn't know the answer to the question,
12 he can say so.

13 THE WITNESS: I am afraid I have to. Otherwise
14 I'm going to be argumentative in areas that I really don't
15 understand. I am sorry.

16 Q I don't mind your arguing with me. You are not
17 going to hurt my feelings.

18 My specific question is this: you have divided
19 the expenses in your testimony today in two general categories.
20 One relates to barbers. I am going to call those financial
21 expenses.

22 The other relates to administrative expenses,
23 is that correct?

24 A Not quite.

25 MR. HELLERSTEIN: Objection. We are getting

1 jqd

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2 involved in a semantic argument construing this agreement. I
3 think he is a witness who ought to be asked questions that
4 are addressed to witnesses and not to lawyers.

5 THE COURT: I am going to overrule your objection,
6 Mr. Hellerstein. If this illuminates the situation for me
7 I want it. If not, I will disregard it.

8 A I am familiar with the fact that I have a need
9 for current income and my half of the retainers or advances
10 were supposed to help me toward that end. That was the under-
11 standing I reached with Mr. Oztemel and it's there in his
12 handwriting.

13 How his half of the retainer was to relieve him of
14 his financial burden, I am afraid I cannot answer that.

15 THE COURT: Dr. Stern, let me intervene here.

16 You people are calling upon me to do quite a job
17 which is to figure out what this schedule means. Each of you
18 contends something different. One of the items which may be
19 relevant to my determination as to what this means is what
20 the respective parties have to say as to their interpretation
21 of it. It doesn't bind me, I realize that, and I am fully
22 aware. And, Mr. Hellerstein, I understand that a cardinal
23 proposition in the construction of contracts is that if it's
24 construable on its face it must be construed on its face.

25 But there is at least an argument as to ambiguity

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here so, therefore, I am willing to hear testimony on it.

Now, in this column I understand what the word revenue means. Revenue can refer to sources of income, right?

THE WITNESS: Yes, sir.

THE COURT: You have been talking as much about sources of income as anything else. I am not interested in that question of sources of income. I want to know what kind of expenditure Satra would have to make, in your opinion, to get any credit for the figures that are referred to over here. For example, if Mr. Oztemel were to buy a chocolate soda in New York at Schrafft's, having nothing to do with IBM it would have no reference to this.

In other words, there would be certain kinds of expenditures, I assume, on the part of Satra which you would agree that they were to receive some credit for. It's not responsive to say I don't care what they do with their money. The question we are talking about is what comes off the top.

THE WITNESS: I understand. The easiest way I can answer is the written stuff at the bottom where we hear 50-50 on the retainers. That I have no visibility on. The schedule you speak of, it was my understanding that associated with sales there will be barter, perhaps even Mr. Oztemel would have to pay off someone. That I don't know. But he

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would have some financial expenses associated with that end of the activity.

THE COURT: Sales?

THE WITNESS: That is right.

THE COURT: I take it when you say associated with sales there might be some expenses, you would have anticipated whatever is normal in business practice would be charged?

THE WITNESS: His end of it, absolutely.

Q Does that include hotel rooms, translators, and the various services involved in running the travel agency over which we have had a lot of testimony?

A I would have thought he would cover much of that out of the 50-50 split of retainers. You remember, this was before we had an agreement with IBM and we were hoping for high retainers.

MR. HELLERSTEIN: Could the witness be questioned to answer as to only his knowledge and not to surmise what Mr. Oztemel may have done in treating his own affairs, if you know, answer it.

THE COURT: His knowledge or his actual belief as to what was intended at the time, not what he would have thought but what he did think.

MR. SIMON: I wouldn't quarrel because obviously

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I am in the presence of a more than experienced jurist, but it's a little unusual for the plaintiff's counsel to ask the Court to tell the witness not to testify as to his range of knowledge.

THE COURT: You may not want your client to say something he doesn't know anything about.

Q Your answer is no as to whether the translators, the hotel workers --

A That is not my answer. I didn't say that.

THE COURT: I think he made an answer which satisfies me although it doesn't satisfy either lawyer.

MR. SIMON: It satisfies me if it is the truth.

Q Dr. Stern, I want you to look at the agreement, paragraph C, which says, as I read it, that all expenses for the project will be advanced by Satra to be recouped out of earnings.

Is it your testimony that that provision did not cover the translators, the hotel rooms, and the other amalgamation of incidental administrative expenses amounting to over \$100,000 a year which Satra incurred?

Before you answer that, your Honor, the figure of \$100,000 appears in the exhibit which the Court has conditionally reserved judgment on. We think it's material on this issue. But I point out it is not in evidence. That is

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just what is on the proffered exhibit.

MR. HELLERSTEIN: I object to the question first, as to form, because it's loaded and argumentative. Secondly, I object to the question because again we are asking the witness to construe paragraphs of the agreement which I don't think --

THE COURT: I know we are. I am allowing it at this time because, as I have said before, I think it's at least an argument that can be made since there is an ambiguity which remains in the situation and if I conclude there is ambiguity which remains, I want to know what the parties have to say.

MR. HELLERSTEIN: Then any discussions that were had between the parties would certainly be admissible to clear up an ambiguity if they do, in fact, clear up an ambiguity. Otherwise, this is all a matter of argumentation for the lawyers and I can't see that a witness' private recollection or understanding, which is even worse, of what a particular phrase means has any bearing on the question or any utility for us.

THE COURT: I sustain your objection as to the latter part. I think you are free to ask Dr. Stern what discussions were had with regard to paragraph C and to go on from there.

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MR. SIMON: Could we be heard just a moment on that? If I have ever seen an ambiguity in a contract it is the statement on the face that all expenses are to be recouped and the testimony by parties thereto that that doesn't mean what it says.

It seems to be perfectly material to this to ask Dr. Stern what it does mean, if it doesn't mean that all expenses are to be recouped out of earnings. I am not trying to get his legal opinion.

THE COURT: You can ask Mr. Hellerstein what it doesn't mean, if you want. Dr. Stern's opinion on the subject wouldn't be as significant to me as Mr. Hellerstein's. If you want to ask him why he says it doesn't cover something, there is some actual fact that has occurred that prompts him to say that, I will accept that.

Ask him why he takes the view he does about paragraph C.

THE WITNESS: If I may continue the sentence you asked, because that gives me the answer, it says all expenses for the project will be advanced by Satra to be recouped out of earnings, if any. That is why my curve has to start at zero, if any. That is a mathematical expression which I understand.

THE COURT: Let me ask you, Dr. Stern, I under-

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2 stand that to a mathematician the phrase "if any" would be
3 a mathematical concept, but it could be a legal concept too.

4 Do you say what you say because you have talked
5 about this phrase with anybody at Satra or do you say this
6 merely as a matter of your own logical approach to the
7 situation?

8 THE WITNESS: This was my best understanding
9 at the time from discussion and from the words, and my under-
10 standing.

11 THE COURT: Will you tell me what discussion you
12 had to which you are referring?

13 THE WITNESS: Yes, we discussed --

14 THE COURT: "We" being you and who?

15 THE WITNESS: Hanno Mott and Bill Hermann when
16 this schedule first was discussed relative to the earlier
17 agreement. This schedule was first introduced and discussed
18 with me relative to their effort to modify the August 25
19 agreement. They wanted to attach this schedule. There
20 we discussed very, very clearly that the meanings of the
21 words incremental, meaning that zero revenues, zero expense
22 reimbursement as revenues begin to come, there would be some
23 sharing. My share being reduced somewhat by the recoupment
24 according to the pre-arranged schedule. These words here
25 were not prepared by me but they meant to me that there was

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a clear understanding of what I have just now said.

Q Did you not agree, Dr. Stern that the \$100,000 would stand in lieu of actual figures, in lieu of an audit and in compensation to Satra for all its expenses?

A No, sir, never.

Q With whom did you have a contrary agreement?

A If that were so it would begin --

MR. HELLERSTEIN: Objection.

THE COURT: I will sustain the objection as to form.

MR. HELLERSTEIN: I might say, your Honor, the testimony that Dr. Stern just gave was reviewed by the jury specifically. They came back and they asked to hear what Dr. Stern had said in connection with this expense schedule.

This was pursuant to your Honor's instruction and Mr. Hill's argument and my argument and it's discussed in Point I of the memorandum we handed up as to whether or not there was a meeting of the minds on the question of this expense schedule, and the jury, in giving a verdict for the plaintiff, necessarily had to find that there was a meeting of the minds. We are going over and rehashing exactly what this trial was supposed to decide.

THE COURT: I quite agree with you that the jury had to find there was a meeting of the minds. What I am not

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2 in a position to say, at the moment, is that it necessarily
3 follows, although it may well follow that the only conclusion
4 they could have come to was that Dr. Stern's version is the
5 one about which there was a meeting of the minds. That
6 observation is made merely because I haven't had an opportunity
7 to study the record and consider it.

8 MR. SIMON: May I go on to the next question and
9 come back and address myself to that point?

10 Q If, in fact, Satra incurred no expenses as a
11 result of financial transactions were they entitled to
12 \$100,000 credit against \$250,000 revenue if earned?

13 A Yes, according to the schedule here.

14 Q Does it not then follow that the \$100,000
15 encompassed all of their expenses?

16 A I don't know.

17 MR. HELLERSTEIN: Objection to the form of the
18 question.

19 THE COURT: Overruled. He says he doesn't know.

20 Q You don't know?

21 A No.

22 Q It is your testimony, is it not, that Satra was
23 to look to retainers or its half of the retainers to recoup
24 some of these very substantial administrative expenses?

25 MR. HELLERSTEIN: I object to the form of the

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question and the relevance. The question is being asked to construe the agreement.

THE COURT: Mr. Hellerstein, you have an objection all the way through. I won't be corrupted by the views of Dr. Stern if he has any.

MR. HELLERSTEIN: It seems to be unfair to the witness to ask him to be a lawyer.

THE COURT: Overruled. If you can answer the question, you may.

(Question read.)

A I don't understand the meaning of the word "very substantial administrative" --

THE COURT: These expenses, then.

Q Financial expenses.

A Just like my half were enable me to live, I would assume Mr. Oztemel would use his half to continue to maintain his chauffeured Rolls Royce in London, New York and elsewhere in the world. What else, I don't know.

Q Dr. Stern, there is no jury here so we don't have to get into that.

A I don't know.

Q Dr. Stern, you do know, do you not, from hindsight if not from foresight, that the cost of operating the office was about \$100,000 a year?

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2 A Oh, no, sir.

3 THE COURT: Mr. Simon, I am going to cut you off.
4 We've gotten as far as we are going to get in getting a feel
5 of what Dr. Stern's approach to the situation is. You lawyers
6 are free to argue about the reasonableness or unreasonableness
7 of that if it is still left in the case and the jury has
8 already decided it.

9 I thought today's testimony was going to be,
10 and I think it will have to be sooner or later a question of
11 establishing what needs to be established unless it's already
12 in the record, what moneys have come into Satra as a result
13 of this venture; what moneys have been paid by Satra as a
14 result of his venture and then such testimony as falls
15 within my concept of what is relevant on the mitigation of
16 damages, to wit, the theory espoused -- not espoused, but
17 articulated in the plaintiff's recent memorandum.

18 I think Miss Martin advised you that I agreed
19 with Mr. Hellerstein's theory about mitigation of damages
20 but it did not seem to me to preclude the possibility that
21 defendants could put in some evidence to show that this
22 venture might yet fall within that theory.

23 MR. SIMON: If the Court pleases, I accept the
24 Court's limitation and I agree that where we have come so far
25 is to conclude that Dr. Stern and I do not agree. We will go

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2 on to the next thing.

3 Q Dr. Stern, you do know when you signed the
4 agreement on August 31 that the retainers from IBM would be
5 nominal, did you not?

6 A Negative.

7 THE COURT: No, you did not?

8 THE WITNESS: No, I didn't know.

9 Q When did you learn that the retainers from IBM
10 would be very nominal?

11 A Let me go through it in my mind. August 31 we
12 had had no negotiations with IBM. September 9 there was a
13 Satra memorandum speaking of a couple of hundred thousand,
14 \$500,000 worth of retainers. We didn't know until September
15 17 in Mr. Withan's office.

16 Q I am going to read to you, for the purpose of
17 refreshing your memory, from a portion of your own counsel's
18 brief in this matter beginning at page 157 of the transcript.
19 It is your testimony on direct examination at the instance
20 of your counsel:

21 "Q This was at this lunch?

22 "A Yes.

23 "Q And I think you said September?

24 "A September 8 here in New York.

25 "Q What did Mr. Stafford say to you?

1 jqd
2 "A He thought it would be a good technique" --
3 and I will skip a little bit there to put you back in the
4 picture.

5 Then the question was asked by your lawyer:

6 "Q What did you say about that?

7 "A I said we would expect some kind of
8 retainer. He said, well, that may be awkward for IBM, they
9 are used to giving commissions but maybe or maybe not on
10 retainers. I backed off. I said all right. We would like
11 a showing of good faith on the part of IBM. We would like
12 to see at least a nominal retainer and if that could not be
13 so you could make that an advance against commissions, but
14 we want some current early incomes."

15 Does that refresh your recollection?

16 A That is exactly right on September 9, the day
17 after September 8. I received a memorandum at the Satra
18 office which instructed me that they were looking to several
19 hundreds of thousands of dollars a year for the retainer.
20 As a result, at the September 17 discussion at Mr. Witham's
21 office I did not carry the burden of the discussion of
22 retainers. I stayed out. Everything you have said is right
23 and everything I have said is right.

24 Q So on September 8 or at your lunch with Stafford,
25 who was then an IBM employee, you agreed to the proposition

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that there would be a nominal retainer?

A Yes, sir, I was willing.

Q And that is the philosophy that was followed throughout this series of negotiations?

A Negative. No, sir, I just said September 9 I was given a written memorandum saying exactly otherwise.

Q Disregarding for the moment, Dr. Stern, the question of the internal memorandums, the fact is that IBM paid a nominal retainer, did they not?

THE COURT: That is in the record.

Q And the retainer which you asked for was an advance before commissions were earned, was it not? That is the way you described it in your conversations.

THE COURT: That is not disputed either.

MR. HELLERSTEIN: Also, it's irrelevant because the document between Dr. Stern and Satra that is supposed to inform the whole proceeding is preceding in time these conversations.

THE COURT: I am well aware of that.

A What is the question?

THE COURT: The last question, I say, was answered by the record. There is no dispute that the 25,000 figure paid for commissions was earned.

Q Dr. Stern, did you include the word "retainer"

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in the contract with IBM? Was it in the contract?

THE COURT: Exhibit I?

MR. SIMON: The September 22 contract. I believe it's L.

THE COURT: Would you point it out.

Where does it occur?

MR. HELLERSTEIN: Exhibit I, Article II, paragraph B is the paragraph on retainers.

THE COURT: The question is, Dr. Stern, Article II, paragraph B, the second line, you use the word retainers. Was that word included at your request, if you remember?

THE WITNESS: To the best of my recollection, the IBM attorney and I discussed this and the resulting wording was his. We discussed retainers. We discussed the fact that they would want these current income payments to be advances against commissions. The best I can say is as a result of a joint effort.

Q Dr. Stern, is there any other place in any of these documents where the word retainer appears?

MR. HELLERSTEIN: I object to that question.

THE COURT: Sustained. It's either in there or it isn't, Mr. Simon.

Q Dr. Stern, let me give you a preface and I will ask you a question and I hope it's not unfair. If it is I am

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sure counsel will object.

You had a deal, and the jury so found, that said that retainers passed to you free of expenses. On September 8 you talked to an IBM man and he said "We don't like to give retainers." You, thereupon, were delegated or took upon yourself the task of negotiating the contract carrying the draft back and forth and the word retainer appears.

Searching your memory, was not the word retainer placed in the contract at your request so that you could get some money free of the expense burden?

A The word retainer is in the standard form of the Satra consulting agreement and I asked them to adhere to as much of that as they would be able to. The resulting wording was a result of our joint discussion. I cannot say I was fully responsible for any single word in the document.

Q Just between us, Dr. Stern, did you know when that word appeared that you were entitled to expense-free money?

MR. HELLERSTEIN: Objection, your Honor. I see no relevance whatever in this line of testimony. The witness is being badgered by repeated questions on the same point.

THE COURT: I will sustain the objection. Not on the grounds of badgering, but it is sustained.

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1 Q What distinguished a retainer from an advance
2
3 commission?

4 MR. HELLERSTEIN: I think the witness, your
5 Honor, should be asked questions as to discussions and not
6 what he thinks words mean.

7 THE COURT: Did you ever have any discussions
8 with IBM or Satra as to the differences between advance
9 commissions and retainers?

10 THE WITNESS: Yes.

11 Q Would you state the substance of those discussions?

12 A I discussed with Satra --

13 Q With who?

14 A With Mr. Schloss, Mr. Hanno Mott and with
15 Mr. Giffen, whether advances against commissions which I had
16 been willing to offer, whether they would be treated as
17 retainers.

18 The decision was --

19 Q Dr. Stern --

20 MR. HELLERSTEIN: Don't interrupt.

21 MR. SIMON: That is not my question.

22 THE COURT: The question was: What was the
23 substance of those discussions.

24 MR. SIMON: What was the substance of the discus-
25 sions as between a retainer and an advance commission.

1 THE WITNESS: That is exactly what I am going to
2 say.
3

4 THE COURT: He told us one part of it.

5 A The decision was Mr. Schloss specifically said
6 we consider them both to be current kind of income. We know
7 that the commissions are often future. In fact, his very
8 favorite words were "two families cannot earn a living on
9 things in the future." We need current money. Whether they
10 are retainers or advances against commission, you will get
11 half as indicated in your agreement.

12 And I may want to remind you I had even discussed
13 with him the meaning of the discount present value of future
14 moneys. Why these things are in different categories.

15 Q Dr. Stern, are you telling the Court that advance
16 commissions likewise bear no expense burden?

17 MR. HELLERSTEIN: Objection. The witness just
18 completed repeating a conversation to the best of his
19 recollection and Mr. Simon is asking to characterize that
20 conversation.

21 THE COURT: Sustained.

22 MR. SIMON: Your Honor, it does seem to me that
23 at some point in time we have got to get from the ivory
24 tower down to the ground.

25 THE COURT: The question is how to get there,

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2 Mr. Simon. The question is whether it's for the lawyers to
3 get there or not.

4 I must say that Dr. Stern's speculating and
5 theorizing doesn't mean anything more to me than anybody
6 else's speculating and theorizing. If there was something
7 that happened that he can report to me that casts light on
8 the situation, that does help. When he reports a conversation
9 on the subject, that is meaningful.

10 When he says, "What I think is this," it's no
11 more important than what Mr. Fisher thinks.

12 MR. HELLERSTEIN: I want to comment to your
13 Honor that every piece of conversation that we have had
14 related this afternoon is in the record and I can cite you to
15 page and line where it's in the record.

16 The defendant's have had a full and extensive
17 opportunity to cross-examine Dr. Stern and instead of coming
18 into the questions that we were supposed to deal with this
19 afternoon, they are taking this opportunity to have a rehash
20 of the trial.

21 THE COURT: I can't believe that they are doing
22 that with any malevolent purpose because it wouldn't get them
23 anywhere and they know that.

24 It's a different approach towards the question
25 that we have got, but I do agree that the questions we have

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2 here are not what people happen to think about the situation
3 but what happened and what I have before me. Indeed, at the
4 outset of the case, you pointed out to me that you thought
5 that I could decide the question whether the IBM contract was
6 continuous of the first one on the faces of the documents.
7 I expressed some doubt about that. I might have to look at
8 some other information.

9 On the whole, that is the approach to take towards
10 this construction of a contract and while I agree, and I have
11 indicated that I agree that there is room for argument as to
12 whether paragraph C and the expense schedule may not have
13 ambiguities in them, I don't think those ambiguities are
14 cleared up by my hearing Dr. Stern's theory of things.

15 Q Dr. Stern, did you have a conversation with the
16 people at Satra whereby there was discussed the fact that
17 all advances against commissions would never be charged with
18 expenses?

19 A Yes, sir.

20 Q Suppose, as in fact was the case, an advance
21 against commissions was recouped by IBM out of commissions
22 payable. Did you have any discussions with Satra that covered
23 that circumstance?

24 A You know, you give me a hypothetical thing and
25 let me answer with a specific. We received \$25,000 as an

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2 advance against commission. Half of that, 12,500, the check
3 was drawn by the treasurer and handed to me by the vice
4 president.

5 There were no objections by the attorney from
6 Satra. I, therefore, came away assuming we all understood
7 the same thing.

8 Q I agree.

9 At some point in time the \$50,000 was charged
10 back by IBM against commissions then owed to Satra for sales
11 made in concluding, was it not?

12 A Yes, sir.

13 MR. HELLERSTEIN: If you know.

14 THE WITNESS: I believe so. I shouldn't answer
15 those things. I am sorry.

16 That is info that you fellows have in the stipu-
17 lation.

18 THE COURT: It must be in the record.

19 MR. SIMON: It is.

20 Q Were expenses charged against that payment?

21 THE COURT: If you know.

22 MR. HELLERSTEIN: If your Honor please, this
23 contract had been repudiated before that event took place.
24 This is just an example of where we are going.

25 THE COURT: I sustain the objection because it

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seems to me clear that the witness has no knowledge of which he can answer the question.

MR. SIMON: Can I ask him if he has knowledge?

THE COURT: You can ask him that.

Do you have any knowledge as to whether expenses were charged against \$50,000 -- knowledge not by rumor?

THE WITNESS: I have no direct knowledge.

Q Did you ever seek reimbursement from Satra for your own personal expenses?

MR. HELLERSTEIN: This is irrelevant. There is no issue in this.

THE COURT: Overruled.

A You mean after the August 31 agreement?

Q Yes, at any time.

A In connection with the other, I was reimbursed according to the agreement only for my expenses going to Moscow and back and for associated detainment of IBM, or something like that, exactly in line with what is in here, that is all. I was not reimbursed for all the other expenses I had.

THE COURT: When you say it's in line with what is in here, what are you referring to?

THE WITNESS: In paragraph C it specifically says the only thing they are going to cover is foreign travel.

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if they approved it, and that is what they covered.

Q You got your money back, other than your travel from California to New York?

THE COURT: Apparently yes.

A Yes.

Q Did you ever discuss the fact with Mr. Oztemel that at any time you were coming out better in the deal than Satra?

MR. HELLERSTEIN: Objection to the question, your honor. I don't know why it's relevant.

THE COURT: Overruled.

A Did I ever discuss with him that any time I was coming out better than Satra?

THE COURT: That doesn't assume that I accepted the premise to the question, but did you have such a discussion?

THE WITNESS: No, no way. In fact, it was the other way but let's not argue about it.

MR. SIMON: Your Honor, what I would like to do is to ask Dr. Stern some questions but it would strictly be a question of his opinion as to how the expense schedule works. I would like to hand him some things and see how he can answer it. I think that is appropriate.

MR. HELLERSTEIN: If I asked those questions in

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Ft. Worth I would be run back to New York. I think it's ridiculous.

THE COURT: I am not sure about your premise.

MR. HILL: Your Honor, Mr. Simon is a guest here and that was uncalled for.

MR. SIMON: My feelings are not hurt.

THE COURT: Gentlemen, please.

I'm afraid I will have to rule that line of questioning out of order. You are perfectly free to give me your own views, if you want to put it, of the unreasonableness of various hostile methods of operation.

Q Dr. Stern, did you ever discuss with anyone at Satra the idea that expenses were to be recouped on a 40 percent basis, strictly 40 percent of gross revenues to be deducted and repaid by Satra for expenses?

A That is something completely new to me. It happens to coincide with the first increment but nowhere else.

THE COURT: Did you ever talk to anybody on that subject? That is the question.

THE WITNESS: There was once an offer by Mr. Oztemel to have a 60-40 share. That is the only thing I can recall.

THE COURT: 60-40 share of what?

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THE WITNESS: Total revenues.

THE COURT: The question being asked is whether you ever had a conversation with anybody from Satra that the way expenses should be handled would be for 40 percent of the revenues to be charged as expenses, is that right? Is that your question?

MR. SIMON: Yes, sir.

THE WITNESS: You mean all of the revenues and all the expenses? The answer would be no.

Q Since there never were revenues in excess of 250,000 in any year, let's confine --

A We are speaking about before there were any revenues at all. I am all mixed up. You are speaking before there were any revenues at all.

THE COURT: Yes.

Q Did you have such a discussion?

THE COURT: Before there were any revenues, you sat down and talked about various expenses. One of the ways you discussed the possibility that when revenues did come in they would be charged, 40 percent charged in lieu of expenses. Did you ever have such a discussion?

THE WITNESS: Our discussion was at the meeting at the first increment --

Q With whom?

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A Hanno Mott and Bill Hermann, that that number was easy to calculate. During the first increment the slope is 40 percent but then it varies from there.

THE COURT: We can see what it does. We are asking whether you had a conversation that it wouldn't vary. It would always be 40 percent.

THE WITNESS: No.

Q The question is, did you have the discussion with Hanno Mott and Bill Hermann of applying 40 percent at least to 250,000 without getting involved with the other statements? Your answer is yes?

A My answer is that is the interpretation of the first increments. We did discuss that interpretation of that initial increment.

Q Did you agree with them that 40 percent of all of the revenues at least up to 250,000 in any year would be applied to expenses?

A In an incremental way. I am not sure I understand the language you are using.

Q Did you agree with Hanno Mott and Bill Hermann that 40 percent of at least the first 250,000 that came in in any year would go to Satra as an expense allowance?

A As applicable to the schedule leaving out the handwritten part, yes.

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2 Q And that was your agreement, leaving out the
3 retainer? That is what you are telling the Court the deal
4 was?

5 MR. HELLERSTEIN: Can't Mr. Simon get an under-
6 standing of where he could ask him or where he can't? We go
7 back to the same point and he keeps on insisting asking
8 objectionable questions.

9 Q I will rephrase the question.

10 Did that agreement change?

11 A Did what agreement?

12 Q The agreement you made or the discussion that you
13 had with Mr. Hanno Mott and Mr. William Hermann that out of
14 the first \$250,000 in any year, 40 percent would be applied
15 as expenses?

16 MR. HELLERSTEIN: Dr. Stern was asked this on
17 direct and cross. Mr. Mott was asked this question.
18 Mr. Oztemel was asked this question. Why does this have to
19 be an issue here?

20 THE COURT: Now that we are getting into the guts
21 of this subject matter, while I don't recall all of the
22 material that was before the jury, it seems to me there was
23 a great deal of this and I continue to be baffled. This is
24 absolutely not what I expected this hearing to concern itself
25 with.

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I also feel frustrated about the situation. What are you trying to bring out today that wasn't brought out in the trial?

MR. SIMON: I believe that the jury determined the parties tried to make a deal and I think the parties had the basic rudiments of an agreement

THE COURT: But the jury certainly must be construed to have decided that the parties made a deal, not tried to make a deal.

MR. SIMON: I agree. But I don't know and couldn't state to the Court how to apply this expense factor. It seems to me that the only evidence, unless we go on pure conjecture, of how to apply the expense factor, is to ask the parties what they agreed to.

MR. HELLERSTEIN: At Tab 1 I have collected all the testimony at the trial and it's rather thick on this precise point.

THE COURT: There are two points. Believe me, Mr. Simon, and I feel particularly sensitive in view of the fact that you are from another part of the country and I don't want to give the impression that I am being rude or not giving you the opportunity to prove what you are fairly entitled to, but putting that aside, there are two points I would like to make.

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Without being able to recall in detail what the testimony was at the trial in this issue, I certainly do recall there was plenty of testimony about it. Nobody was really foreclosed from bringing out anything he wanted to bring out. I am not going to apply arbitrary rules of res judicata or waiver or estoppel or anything else. Certainly we don't want to go back over stuff that could be there or should have been there.

The second is, I don't find it's helping me very much to decide what this is all about except to the extent that there were actual discussions. Yes, when he said they had a discussion in interpreting the first 100,000 or the 250,000, 40 percent of that, that means something. I don't know how much, but it means it's a little tiny little glitter that may be of value some time.

MR. SIMON: I won't belabor the point. My own feeling about this, and I certainly bow to your recollection, which I am sure is better than mine, but my own feeling about this is that I think the Court can do this one of two ways.

The Court can just sit down and say this is a contract signed and sealed by the jury and I'm going to figure out what it means, or the Court can say there is an awful lot of confusion about how this expense schedule was going to be applied and we can hear the evidence of the only people whose

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2 testimony would mean anything.

3 THE COURT: Mr. Simon, I don't think it's reason-
4 able to believe that I have closed the door to the latter
5 approach. The question is, even if I leave it open, what
6 do we do? I have said I am not prepared to say there is
7 no ambiguity. I am not prepared to say that I can decide
8 this just on the face of it although I think maybe I can.
9 I would have to consider what the jury verdict -- what the
10 impact of the jury verdict is on this. But I have also said
11 to the extent I am willing to take testimony about what the
12 contract may mean, it must relate to conversations or trans-
13 actions between the parties and not speculation and theori-
14 zation. I would be no more interested as to what Mr. Oztemel
15 would say. You and Mr. Hellerstein can give me theory.

16 MR. HELLERSTEIN: Even apart from Mr. Simons'
17 point about what the jury decided or didn't decide, we have
18 a record. It's still the record for this hearing. There is
19 no reason I see to rehash that record.

20 THE COURT: There is no reason to rehash but if I
21 read it yesterday I would be in a position to tell you whether
22 I think we have covered the precise point in question and
23 since I haven't, I can't remember whether the precise point
24 has been covered. I will allow Mr. Simon to ask further
25 questions about conversations between parties and I am

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2 sticking to that in that order.

3 MR. SIMON: Before we got derailed, and I think
4 Mr. Hellerstein's comments may have been appropriate in some
5 of the earlier sessions, this line was: did you discuss a
6 40 percent expense factor with Mr. Mott and Mr. Hermann and
7 the answer was yes.

8 My next question was: Did you have any agreement
9 before the agreement was signed?

10 THE COURT: The answer was that was the inter-
11 pretation of \$100,000 to 250,000, is that right?

12 THE WITNESS: Yes.

13 Q Did you have any further discussions before the
14 agreement was signed?

15 THE COURT: Did you have any discussions of using
16 the 40 percent factor in some way with respect to expenses?

17 THE WITNESS: Not that I can recall.

18 Q Why did Mrs. Hauser include that when she submitted
19 the thing to Satra?

20 THE COURT: You can't ask him if she did.

21 Q Did you ask her to put the 40 percent factor in
22 when you submitted the contract to sign? I believe that is
23 XX.

24 A I gave her my interpretation of the understanding
25 we had reached relative to the operation of the expense.

1 jqd

2 Q Dr. Stern, I noticed in looking at Plaintiff's
3 Exhibit C -- and I will tell your Honor I am almost through--
4 that the retainer portion of it, that is the expense-free
5 taking of the retainer, did not apply under alternative two.
6 Did you have a specific discussion with Mr. Oztemel
7 limiting the expense-free retainer to alternative one as
8 opposed to alternative two?

9 A Yes.

10 Q What was the nature of that discussion?

11 A He was urging me to take alternative one -- by
12 the way, I went over this here.

13 THE COURT: Go ahead, do it again.

14 A He was urging me to take alternative one. Even
15 though he had whittled me down and down and down on the
16 salary, and he still didn't want to advance any salary at all.
17 He didn't want to take any risk at all. He was urging me to
18 take the 50. I then said it becomes very, very confused.
19 Even though if we do get IBM, which I don't know, and I don't
20 know how long it's liable to take and as to the risk that I
21 have, it now gets very complicated by the application of this
22 expense schedule and I cannot have any gut feel for what kind
23 of current income I might have.

24 He then immediately volunteered. He said I am
25 right, that expense schedule really is applicable to the

1 jqd Stern-direct 117
2 effort he has to exert in consummating the sale to financing
3 the barter and as an inducement from me to accept the 50-50
4 sharing he offered that there will be no application of the
5 expense schedule to the current income.

6 I said, "Good, you say that, write it down," and
7 I must say I said, "Sign your god-damn name."

8 Q Was there any discussion at all as to the maximum
9 amount of retainers that you might get or would seek from IBM
10 at this time?

11 A When and with whom?

12 Q With Mr. Oztemel at the time he limited the
13 retainer portion alternative to I?

14	A	No, sir.
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15 MR. SIMON: I suppose it's appropriate to ask
16 Dr. Stern some questions, for the sake of developing the
17 record, of what he has done in the nature of mitigation, for
18 whatever significance it may have.

19 MR. HELLERSTEIN: Can we find out from Dr. Stern
20 if he needs a recess?

21 MR. SIMON: I can use one myself.

22 THE COURT: All right.

23 (Recess.)

24 THE COURT: All right, Mr. Simon.

25 Q Dr. Stern, I am going to take advantage of the

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lawyer's prerogative to change his mind and ask you a couple of more questions about some of the numbers before we get to the issue of damages.

I have given you, which you will find on your left, Defendant's Exhibit 1 introduced at this hearing, or at least identified.

My question to you is, leaving aside for the moment the characterizations as to whether they had the adverse affect on anyone's position, are these the figures as you understand them which represent and evidence total receipts from IBM?

THE COURT: I don't see what the witness' understanding of that is. I understand there is a stipulation between the parties as to the receipts.

MR. SIMON: I think there is a stipulation that these are in fact the numbers --

THE COURT: I don't know whether those are the ones that are, in fact, the numbers, but if you want to check the stipulation against the exhibit, that is perfectly all right.

MR. SIMON: Does anybody argue about it? I want to use it to talk about it. I have no probative effect involved. I might say, your Honor, if in fact the numbers as evidenced here vary from the stipulation, we will all be guided by the stipulation.

1 THE COURT: All right.

2 What is the question you have?

3 Q I call your attention to the fact that there are
4 five different categories of receipts from IBM as they run
5 across the top of the page and I again tell you these are
6 strictly my language.
7

8 ' original retainer commissions on goods
9 delivered, monthly payments per paragraph 2 of the contract
10 dated December '73, advance commissions and reimbursements.

11 Do you see those five categories?

12 A Yes, I can see them.

13 Q My first question, Dr. Stern, based on your dis-
14 cussions with the Satra people and the contract which you
15 made, is there any extension factor as applied to the \$50,000
16 that came in the fall of 1971?

17 A I really don't understand what you are talking
18 about.

19 MR. HELLERSTEIN: He is asking the witness to
20 draw legal conclusions.

21 THE COURT: I don't know whether you are asking
22 him that there should be something charged against him, in
23 which case I will sustain the objection, or whether you are
24 asking whether there was actually something charged against
25 it, in which case it's a question of fact and he either knows

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2 or he doesn't.

3 MR. SIMON: If the Court please, I suppose it
4 might be useful to state for the record our position here.
5 As I recall the testimony on direct of Dr. Stern, indeed the
6 background --

7 THE COURT: Today?

8 MR. SIMON: No, sir, the basic testimony. It is
9 in large measure what his understanding of the contract was.

10 I understand -- before Mr. Hellerstein stands
11 up -- that Mr. Hellerstein thinks that Dr. Stern's under-
12 standing of the contract, the deal that he made, is immaterial.
13 I understand he has objected to this entire line. I further
14 understand that it is your Honor's position that such an
15 objection should be sustained for two reasons. One, because
16 it may not be material to know what his understand was, and
17 two, because the matter may be foreclosed by either the
18 jury's verdict or the Court's desire to construe the instru-
19 ment from the four corners.

20 With that in mind, your Honor, we would state for
21 the record that we believe we are entitled to ask Dr. Stern
22 what his understanding is as to what items of revenue the
23 expense schedule was to be charged to and if the Court sus-
24 tains the objection, which the Court indicated he will, if
25 it is appropriate under your practice, I would like to do it

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2 under a bill of exception or offer of proof.

3 I would like to offer for the record what

4 Dr. Stern's interpretation of his deal is.

5 THE COURT: That is perfectly fair although I
6 think it's clear on the record that you have wished to bring
7 that out in the past. To make it perfectly clear, I under-
8 stand you are offering to prove what Dr. Stern's interpretation
9 of the deal is.

10 I can only say that I don't believe that would
11 be proper at this time and when I say at this time, that is
12 a question of law, it seems to me, whether that is admissible
13 or not admissible.

14 If you can persuade me, if you want to take a
15 little time to go to the library and persuade me that where
16 there is an ambiguity the witness' unilateral interpretation,
17 as distinct from his reporting of events, related to the
18 formation of the contract is admissible, I don't mean to do
19 anything but what I understand the law to be.

20 MR. SIMON: I wouldn't argue the point with you
21 but I think you put it very clearly. If we find or if the
22 Court finds that there is, in fact, an ambiguity, then it
23 would be our position very clearly that the party's own
24 understanding of what was involved is admissible evidence.

25 If the Court finds alternatively that there is no

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2 ambiguity or that whatever ambiguity there is has been
3 necessarily resolved by the verdict of the jury, then I will
4 agree with your Honor that the testimony is not admissible.
5 We make it as an offer of proof.

6 THE COURT: I don't want to call you back again
7 on the basis that I may have too narrowly construed your
8 right to put in evidence. As long as there is no jury I
9 will let you do it.

10 MR. SIMON: We understand it's being offered as
11 an offer of proof and that the objection to it has been
12 sustained.

13 Q Dr. Stern, you will note that in the fall of
14 1971 there was paid \$50,000. That is a fact, is it not?

15 THE COURT: It's stipulated, yes.

16 A I have heard it's a fact question was there to
17 be any expense charged against that \$50,000?

18 THE COURT: You understand that there was, is
19 that right?

20 MR. SIMON: All of my questions suppose that I
21 am asking for the witness' understanding.

22 THE COURT: Dr. Stern has been precise. So we
23 have no mistake about it, I want him to understand what you
24 are asking.

25 As you understand the contract, were there any

1 jgd

2 expenses to be charged against that \$50,000?

3 MR. HELLERSTEIN: I take it that is payments with
4 respect to Satra by Mr. Stern and not the relationship of
5 IBM and Satra?

6 MR. SIMON: I agree.

7 A Mostly the view that exists in my mind now comes
8 from a document which I haven't seen and from headings which
9 makes no sense to me.

10 May I see the original stipulation which I have
11 seen and I do understand? I will be able to answer. That
12 is easier for me.

13 MR. HELLERSTEIN: I show the witness Exhibit DDDD.

14 Q Let's look, if we will, at Arabic 2 of Exhibit
15 quadruple D and if you will accept my statement, the same
16 numbers appear on the exhibit marked Defendant's Exhibit No.
17 1, the first page.

18 I am now looking at the payments dated October 7,
19 1971 and December 20, 1971. There is a typographical error
20 on Defendant's Exhibit No. 1 but we are talking about two,
21 \$250,000 payment, I think is the only two, \$250,000 payments.

22 A Yes, sir.

23 Q Under the deal, as you understand it, was any
24 expense factor to be applied to those sums?

25 A No, sir.

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Q Under the category, commissions on goods delivered, you will notice that in the second year and the third year there are entries; do you see that?

A Yes.

Q That is Defendant's Exhibit 1, the schedule?

A I am looking at Schedule D.

Q From the words nature of payment, there is the word commission and two ditto marks underneath it.

A That is correct.

Q With a rough total among those numbers of about 21 or \$22,000.

A Yes, sir.

Q Dr. Stern, my question is: as you understood the deal, was there an expense factor to be applied to those commissions?

A Yes, sir.

Q What was the amount of the expense factor?

A Assuming they were all in one year and they totalled under 250,000, which they do, then 40 percent of the \$22,716 is to be taken off for expenses.

Q I take it your answer is no different if it is a fact that 19,993.42 was paid in the second year and 2,723.34 in the third year?

A That is correct because they are each under --

1 jqd

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2 THE COURT: Each under what?

3 THE WITNESS: Each under the \$250,000. They are
4 each on the 40 percent slope. That is right.5 THE COURT: May I see that schedule for a moment
6 so I am sure I am making notes with regard to the same
7 figures that you gentlemen are talking about.8 I understand you are talking about commissions
9 received March, April and November 1973, is that right, in
10 the amounts of 7,000, 12,000 and 2,000 plus?

11 MR. SIMON: That is correct.

12 Q Let me ask you, Dr. Stern, let me pose to you a
13 hypothetical question. Let us assume, Dr. Stern, that in
14 the year 1973 the total commissions payable to Satra by IBM
15 for goods actually delivered were, in fact, \$69,993.42 and
16 that IBM deducted the sum of \$50,000 before writing and
17 sending its check. Did I make myself clear?18 THE COURT: Do you have to pick such an odd amount?
19 69,000 is good enough.20 MR. SIMON: 69,000 is simply 50,000 plus the
21 amount of the second year as shown in the schedule. In the
22 schedule the amount shown is 19,993.42 at the second year.
23 The hypothetical assumes that the amount of the commissions
24 owed and payable by IBM to Satra was 69,993.42. Are you
25 with me?

2 THE WITNESS: No, I am sorry.

3 THE COURT: Why don't you use the blackboard.

4 Q With due apologies for the penmanship, here is
5 the hypothetical. Base the assumption, if you will,
6 Dr. Stern, that in the second year of the contract the actual
7 sum which IBM was contractually obligated to pay Satra was
8 \$69,993.42.

9 A Yes, sir.

10 Q Goods sold and the commission applied at either
11 three and a half or seven percent as appropriate, all right?

12 A Yes.

13 Q Make the further assumption hypothetically that
14 IBM deducted from the 69,993.42 the sum of \$50,000 and, in
15 fact, remitted o atra 19,993.42. Can you make that
16 assumtpion?

17 A Yes, sir.

18 THE COURT: What would IBM have deducted the
19 50,000 for?

20 MR. SIMON: They took back the retainers, because
21 they weren't retainers, they were advances against commissions.
22 Are you with me on that assumption?

23 THE WITNESS: Yes, sir.

24 Q Assuming those facts as hypothetically posed to
25 you to be true, what factor at the time of the \$50,000

1 jqd

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2 deduction, and as you understood the deal, entitled you to
3 an expense credit of \$20,000 or 40 percent of the amount of
4 commissions actually earned?

5 A No, sir. They are entitled not to have expenses
6 on the advance. They are entitled to have expenses on the
7 commissions.

8 So they would be entitled to take off 40 percent
9 of 19,993 and some odd cents. I can tell you why, if you are
10 interested.

11 Q You answered the question.

12 Let's turn to the third subsection under
13 Defendant's Exhibit No. 1, which is marked monthly payment
14 as per paragraph two of the contract dated December 1973.
15 You will find some numbers there in the line marked third
16 year.

17 THE COURT: Which exhibit now is this?

18 MR. SIMON: We are working from two exhibits.
19 I am looking at the third year under Defendant's Exhibit No.
20 1, which is the schedule. Those numbers correspond to the
21 last four entries all dated 12/3/73 of page 3 of the exhibit
22 marked Plaintiff's quadruple D.

23 THE COURT: All right.

24 Q Have you got that in mind, Dr. Stern?

25 A Yes, sir.

jqd

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Q Is Satra entitled to expense reimbursement on the sum of \$116,669 or any portion thereof as you understand the deal?

A Where do you get 116,000?

MR. HELLERSTEIN: The \$116,000 sum relates to the sum of the seven payments of \$16,667 as shown on page 3 of Exhibit quadruple D.

MR. SIMON: Let me make that clear.

THE COURT: Please do make it clear.

MR. SIMON: I will do my best, your Honor. On Exhibit quadruple D, the sum of \$116,000 is the total of the figures 66,668 marked monthly fee and the other three figures each in the sum of \$16,667 marked monthly fee.

THE WITNESS: I understand.

Q Are we together on that?

A Yes.

Q Is Satra entitled to charge expenses against that sum of \$116,669 as you understand the contract?

A No.

Q Let us look at advance commissions which commence on 12/22/73 on the third page, marked third year of Defendant's Exhibit No. 1 and which correspond number for number to the figures marked monthly advance at page 3 of Exhibit quadruple D. Are we together?

1 jqd

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2 A Yes.

3 MR. HELLERSTEIN: I object to the form of the
4 question.

5 THE COURT: He just said, "Let's look at some-
6 thing."

7 MR. HELLERSTEIN: The preface of the advance
8 commissions is Mr. Simon's language.

9 THE COURT: He is describing how it's described
10 in Exhibit 1 of today and how it's described on quadruple D
11 before.

12 Q My question: As you understand your transaction,
13 is Satra entitled to any expense reimbursement from the figure
14 marked advance commissions, or, alternatively, monthly
15 advance?

16 A From the monthly advance they are not entitled
17 to expense deductions.

18 THE COURT: As I understand you, you are saying
19 they are not entitled to expense deduction for any item you
20 have been questioned about in the last page of Exhibit
21 quadruple D?

22 THE WITNESS: I will be happy to explain why.

23 Q Dr. Stern, it's your testimony for the purpose of
24 this bill that per your understanding Satra is entitled to 40
25 percent of the sum of \$21,000 and odd cents as an expense

1 jqd

2 reimbursement and that you get one-half of everything else,
3 is that your position?

4 A I don't know what you mean by everything else.

5 Q One-half of all of the other revenues as they
6 appear on the schedule?

7 A I am sorry. You have lost me.

8 Q Let me go back. We are picking figures out of
9 the air and I can understand that. I am asking you now for
10 your understanding.

11 You have testified, as I understand the discussion,
12 that based on the deal the way you understand it, the only
13 items which Satra is entitled to expense reimbursement on is
14 the item marked commission on goods delivered as it appears
15 on Defendant's Exhibit No. 1 or the item marked as an
16 identical item commission as it appears on page 2 of the
17 Exhibit quadruple D and that is the only item on which an
18 expense factor is applied?

19 A Yes, relative to these particular numbers.

20 Q And that is true even though Satra, in fact,
21 based on sales actually completed, had earned commissions of
22 \$71,000 or so?

23 MR. HELLERSTEIN: I object to the form of the
24 question. There are many possibilities.

25 THE COURT: I don't think it makes any difference

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Stern-direct

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whether it's true or not. You have gotten Dr. Stern to express his position and you can argue from that position.

Q Dr. Stern, you were present during the testimony of Mr. Witham, were you not?

A Yes.

Q Is there anything to which he testified that you have personal knowledge of which is untrue?

MR. HELLERSTEIN: I object to the form of the question.

THE COURT: Do you have any personal knowledge of the subject of his testimony?

THE WITNESS: Perhaps minor, at the earlier stages. But there is nothing that I am familiar with that he said that I can dispute. He did say a lot of things I had not heard before.

Q Let me be specific.

THE COURT: Please do.

Q Mr. Witham testified, as I recall, that the figure monthly advance as paid by IBM in the sum total, according to these schedules of \$65,450, was an advance to Satra subject to their repayment to IBM in the event that the deal doesn't go through with the export licenses in issue, is that correct?

THE COURT: Are you talking about the 1973

1 jgd
2 contract?

3 MR. SIMON: Yes, sir.

4 THE COURT: I don't see how Dr. Stern can comment
5 on that.

6 Do you know anything about that?

7 THE WITNESS: I was not involved. I wasn't asked.

8 THE COURT: You don't know?

9 THE WITNESS: I don't know. I heard here but I
10 don't know anything else.

11 MR. SIMON: So I may understand, and your Honor,
12 I am asking this question not for the purpose of the bill,
13 but sort of a voir dire.

14 Is it a fact that you did not participate in any
15 way in the negotiations which led up to the IBM contract of
16 December 1973?

17 THE WITNESS: That is correct.

18 THE COURT: Are you ready to go on now?

19 MR. SIMON: Yes, sir.

20 THE COURT: Go ahead.

21 MR. SIMON: If the Court please, I think we will
22 dispense with the offer of proof and make a normal offer of
23 the testimony as it has been adduced in the offer of proof.

24 THE COURT: I don't understand, Mr. Simon.

25 MR. SIMON: For the record, your Honor.

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THE COURT: My ruling is the same. I reserve decision and I will have to determine number one, whether I consider that after the jury's verdict there is any ambiguity in the contract. I will then have to determine whether the rule is whether there is any ambiguity in the contract the testimony as to the parties' understanding or interpretation of the contract is admissible, and rule accordingly.

Q Dr. Stern, from the date of your termination of the agreement with Satra, and I am not trying to characterize the termination, how have you made your living?

A A variety of ways. I am not hedging. Fundamentally I am a director of a few moderate sized firms from which -- and I hold some ownership in them, from which I gain some fees. I gain some stock opportunities. More recently I have gone into consulting for companies that I am not a director of.

Q Let me ask you to characterize, if you can, if there is any employment which you have undertaken since the fall of 1971 which has occupied your time on a daily basis?

A No.

Q Are you presently drawing a salary for daily services from any source?

A No.

Q Are you presently engaged in consultation --

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Stern-direct

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2 A In order not to confuse you, from a legal point
3 of view I have a corporation under my own name and I take a
4 salary from it. That is just -- the answer that you are
5 looking for is no.

6 Q Let me be sure we understand each other.

7 We are trying to do this in a short fashion.

8 THE COURT: If you spent full time for your own
9 corporation and you got paid \$100,000 a year, that might
10 mean something. If you are telling us that you have a closed
11 corporation which pays you a modest salary and with regard
12 to which you spend a modest amount of your time, that is
13 something else. Is that what you are saying?

14 THE WITNESS: Essentially what I am saying is
15 that I have no arrangements which obligate me to spend full
16 time on anything.

17 Q Have you had any arrangements which have obligated
18 you to spend as much as 50 percent of your daily time since
19 1971?

20 A No, sir.

21 Q Do you do any type of gainful labor that involves
22 consultation with parties interested in doing business in the
23 Soviet Union?

24 A Yes.

25 Q What do you do in that regard? Let me ask you

1 jqd

Stern-direct

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2 without having to rephrase it each time.

3 I am interested from the period of 1971 to date.

4 A I have advised some firms as to what I consider
5 to be a potential market area for them in the Soviets and
6 there are two particular firms I have gone over to Moscow
7 with.

8 Q Which firms are those?

9 A One was Raytheon and the one is the Foxboro
10 Company.

11 Q Approximately what has been your compensation in
12 dollars since November of 1971 for the service of consulting
13 with customers or clients on the potentialities of the Soviet
14 market?

15 MR. HELLERSTEIN: I note my objection to this
16 line, your Honor.

17 THE COURT: Overruled.

18 A For Raytheon we had a honeymoon. I went there
19 with them for a week. I got \$15,000. For the Foxboro
20 Company I have an agreement whereby I get both a retainer and
21 commission.

22 Q My question is: what has been your compensation
23 in dollars from Foxboro Company since November of 1971?
24 That is, for the services relating to the Soviet Union.

25 A It's also been about \$15,000.

jqc

Stern-direct

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Q Do you have any contractual rights with Foxboro Company for future commissions based on work which you have already done?

A Yes.

Q How would you evaluate the present work in dollars of those rights?

A I really cannot evaluate it.

Q What could you receive if it all went to the best?

A I cannot evaluate that.

Q You can tell us, I think, what you might receive if everything went well and then you can define what you're apt to receive if it all goes to the worst.

A I really cannot answer that. I cannot evaluate. That would be very hypothetical and I don't know.

Q Could you receive as much as \$25,000 based on work which you have already done if the dominoes fell in place from now on?

A Yes, sir.

Q Could you receive as much as \$50,000 for work which you have already done if everything went to the best from now on?

MR. HELLERSTEIN: Wouldn't it be easier to ask him what he has?

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THE COURT: What he has?

MR. HELLERSTEIN: What he got in terms of his deal.

THE COURT: What the arrangement is?

MR. HELLERSTEIN: Yes.

THE COURT: What is the arrangement?

THE WITNESS: The arrangement with Foxboro is --

MR. SIMON: I don't mean to interrupt, but this is cross-examination and for reasons of my own I really don't want a discussion of a third party contract as to which I have no knowledge and haven't seen. I would really rather have the witness' evaluation.

THE COURT: I am supposed to be bound by reality and not evaluations. I would like to hear what Dr. Stern has to say. You don't want to invade privacy but if he is willing to give that information it would be more meaningful to me and we can put our heads together and see what we think it's worth.

What is the arrangement?

THE WITNESS: The arrangement with Foxboro is \$25,000 a year as a retainer for two years and three months.

Q Per year or total?

A Per year.

Q When did it begin?

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Stern-direct

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1 A October 1, 1973. And I am to share with an
2 associate five percent commissions on sales during this three
3 years, share equally.
4

5 THE COURT: Two and a half percent to you?

6 THE WITNESS: That is right.

7 Q Was it by applying the figure two and a half
8 percent to what you think the revenues could be that you got
9 the figure?

10 A That is what goes into, Marvin Stern Associates.
11 Against that I have expenses. I have an associate in Moscow
12 that I have to pay and things like that. So I myself get
13 actually somewhat less than that.

14 Q You found, have you not, that it costs money to
15 do business in Moscow?

16 A Do you really want an answer?

17 THE COURT: No, he doesn't really want an answer,
18 but don't be so serious.

19 Q Let me see if I got the summary because I wasn't
20 writing while you were talking. You got 15 from first A,
21 and you have no contingencies. You have gotten 15 from first
22 B and you have contingencies which you think might be worth
23 \$25,000?

24 THE COURT: At one time he said it might add up
25 to more than \$25,000.

jgd

Stern-direct

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1 THE WITNESS: I cannot evaluate that. It's
2 completely out of my hands.
3

4 Q Is it fair to say, Dr. Stern, that prior to
5 August 31, 1971, you had earned no money as a consultant on
6 affairs involving the Soviet Union?

7 A That is right.

8 Q Could you furnish for us now in very general
9 terms, and I would certainly understand if you would prefer
10 to furnish it later in writing, your personal and your
11 corporate income, the corporate income being only the income
12 of your solely owned corporation if it is for the years
13 beginning -- let's just say beginning January 1, 1972, for
14 1972 and 1973.

15 A I am willing if my counsel wants me to, sure.

16 THE COURT: This may or may not be relevant but
17 we might as well get all the information.

18 THE WITNESS: I have nothing to hide.

19 I would like to see reciprocity.

20 MR. HELLERSTEIN: Can Dr. Stern get off the
21 witness stand and pick this out?

22 THE COURT: Yes.

23 Q Would you read the figures into the record
24 identifying them as being personal or corporate and for what
25 years.

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Stern-direct

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Again, let me say this: I have walked this ground before and I understand that where you have a solely owned corporation you have corporate income and conceivably a personal income from the same corporation.

A I will give you just what you are asking for. I've got nothing to hide.

Let's start with the year 1972. My corporate income in 1972 was \$26,684.

Q Is that gross income or is that taxable income?

A Gross. I can show you where it came from, if you are interested.

Q All I was concerned about is that it wasn't reduced by overhanging losses from previous years.

A No, that is the total money that came in, 26,684.

THE COURT: Personal income that year? I would like to know if you know how much of your personal income comes from your corporation.

THE WITNESS: From the corporation I took \$16,250. Then there is other income which you aren't interested in.

THE COURT: I wanted to know what your personal income was and how much of it came from the corporation so I don't duplicate.

1 jqd

2 THE WITNESS: That is rather complicated.

3 THE COURT: Do you have your tax returns?

4 THE WITNESS: I have them here. You are asking
5 for --

6 THE COURT: On the front page of the tax return
7 it usually says what your income is.

8 THE WITNESS: Income other than wages, dividends--

9 THE COURT: There is usually a gross figure
10 there.

11 Do you have any objection if I look at it?

12 THE WITNESS: No.

13 THE COURT: It's this figure here. Adjusted
14 gross income is \$22,282 and, as I understand it, of that
15 adjusted gross income 16,230 or whatever it is, came from
16 your corporation?

17 THE WITNESS: That is right.

18 Q Do I understand the corporation did not have
19 income to that, that it didn't pay dividends?

20 A No, I have the corporate income statement here
21 and you will see it.

22 THE COURT: Yes, okay.

23 Q That is 1972?

24 A That is 1972.

25 THE COURT: The same figures for 1973, if you have

jqd

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them.

THE WITNESS: Surely. 1973, my corporate income was 55,996.

THE COURT: How much of that went to you?

THE WITNESS: Of that I took 19,000 -- is that all -- 19,500.

THE COURT: And back to your personal returns. Adjusted gross income for 1973, personal, was 21,450 including the 19,500.

THE WITNESS: That is right.

Q The figures then generally are between 20 and 25,000 each year and that fairly represents what you took home?

A It's more complicated than that. I have answered what you asked me, not what you just said.

Q Let me ask it this way: what I want to know is just -- you may have had other cash in your pillow. I am not concerned with anything but earnings.

I don't think there is any other objective method of dealing with the subject we are dealing with than is better than the concept of adjusted gross income or taxable income because he may have given a lot of money to charity or something like that. I have told Dr. Stern that I am not interested in whether he had money under his pillow that he

1 jqd

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2 used or whether he sold something at a profit or anything
3 like that.

4 For the purposes of mitigation of damages I
5 don't consider those items relevant.

6 One further question which I think has been
7 answered. You have a corporate figure and from that you have
8 an individual figure. The question I was going to ask is
9 was there any accruals of cash profits from the corporation
10 which came as a result of his own services, and I think you
11 said no.

12 A That is right.

13 MR. SIMON: No further questions, your Honor.

14 CROSS-EXAMINATION

15 BY MR. HELLERSTEIN:

16 Q Dr. Stern, at the beginning of your examination
17 Judge Lasker and Mr. Simon both asked you some questions
18 about the schedule of incremental annual revenue and
19 incremental annual expenses, the last page of Exhibit C and
20 of Exhibit D.

21 A Yes.

22 Q There were other questions that were directed to
23 the language of retainer written by Mr. Oztemel at the foot
24 of that schedule.

25 A I don't have that here now.

1 jqd

2 THE COURT: I do.

3 THE WITNESS: Okay.

4 Q When you and Mr. Mott and Mr. Hermann had your
5 first conversations with the schedule, would you place that
6 time period?

7 A Yes, after Mr. Oztemel and I had reached the
8 agreement of the August 25 document and I was back in the
9 Satra offices. It happened either very late on August 30
10 or in the morning of August 31 and the discussion was --

11 Q Let's not get into discussions. It was between
12 Exhibit B and Exhibit C?

13 A Yes.

14 Q When you had that first discussion was there any
15 discussion of retainer compensation viza-viz commission
16 compensation?

17 A No, that was applicable only to that earnings
18 document. There was no such thing.

19 Q There was no discussion?

20 A That is right.

21 Q Was there any discussion as to what types, if
22 any, of expenses would be governed by the schedule?

23 A No.

24 Q You have testified, and I don't want to ask you
25 to repeat your testimony, as to what Mr. Hermann said and

1 jqd

2 what you said, what Mr. Mott said at the period of time.

3 I want to clear up this particular point: did
4 anyone discuss anything about categories of expenses or types
5 of expenses that were or were not to be governed by the
6 schedule?

7 A No.

8 Q Was it the case that this schedule merely set
9 forth under what circumstances expenses could be deducted?

10 MR. SIMON: I object to that question as being
11 leading, your Honor.

12 MR. HELLERSTEIN: It is leading, your Honor. I
13 am trying to clarify a point. I think the point may be over-
14 clarified.

15 THE COURT: I will allow it.

16 (Question read.)

17 A I don't really understand it.

18 Q It's a bad question.

19 I think the point is well clear.

20 THE COURT: All right.

21 Q Later on you testified you had the discussion
22 with Mr. Oztemel that directly led to the writing of this
23 language, "In alternate one any retainers received would be
24 divided 50-50, other income as above schedule."

25 When you had that discussion did you and

1 jgd Stern-cross 146

2 Mr. Oztemel discuss whether some types of expenses would be
3 covered by the schedule and other types of expenses would not
4 be covered by the schedule? In other words, was your
5 discussion involving categories of expenses?

6 A No.

7 Q What was your discussion, one more time, with
8 Mr. Oztemel?

9 A The discussion -- let me clear it up.

10 The origination of the expense schedule was
11 relative to the earlier document where I received a salary.
12 Here are the final documents, one alternative, the second
13 one, I still received the salary and apparently the philosophy
14 of that expense schedule would hold, no categorization or
15 anything like that.

16 Under alternative one, where I would not receive
17 a salary, the only discussion we had was that for me to get
18 some kind of current income in lieu of salary I had to not
19 have this expense schedule applicable to current income.
20 That is all we discussed. But in arriving at the rationale
21 for it and Mr. Oztemel rationalized after all that makes a
22 lot of sense since --

23 MR. SIMON: We object to what Mr. Oztemel
24 rationalized unless he said it.

25 THE COURT: He said it, is that it?

1 jgd

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2 THE WITNESS: Yes. It was perfectly reasonable
3 not to have the expense schedule applicable to retainers or
4 things like that because really these were expenses to be
5 incurred on the barters and financings with the sales which
6 were really the future income.

7 Q Did you care how Mr. Oztemel or Satra accounted
8 for its expenses?

9 A No.

10 Q Did you care as a joint venturer with Satra in
11 what way Satra set up its books to cover its expenses?

12 A No.

13 Q Was it the purpose of this schedule to alleviate
14 that concern?

15 A Yes.

16 MR. SIMON: If he is asking for Dr. Stern's
17 understanding of what the purpose of the schedule was, which
18 we certainly agree is germane to the issue before the Court,
19 I think that ought to be clarified.

20 If he is asking whether the purpose, as it were,
21 came from our mouths, then I would like to know from who and
22 when.

23 THE COURT: Is your question whether it was
24 Dr. Stern's understanding?

25 MR. HELLERSTEIN: Yes, I asked for your under-

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standing.

Was it your understanding that the purpose of the schedule was to make it unnecessary for you to have a concern as to whether or not Satra actually incurred expenses?

MR. SIMON: I might object and ask why it is that Dr. Stern's understandings are admissible now when they weren't before?

THE COURT: I don't think they were admissible on the other basis. I admit your testimony and his testimony.

MR. HELLERSTEIN: That is exactly right.

MR. SIMON: We object to Dr. Stern's understandings unless the Court is willing to consider them all.

THE COURT: I don't intend to apply any standard and I assume it's offered in that form and it's accepted when offered in that form.

Q During the trial and afterwards, I think today also, you testified about a conversation that you had at this time when this schedule came to be created with Mr. Mott and Mr. Hermann in which the subject of actual versus scheduled expenses came up.

A That is correct.

Q Please state one more time what that conversation was.

A Mr. Mott and Mr. Hermann came in and said that

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2 they were represting the executive committee and they wanted
3 to discuss with me modifications of the agreement that I had
4 reached with Mr. Oztemel relative to the August 25 agreement.

5 They said that after all they would have expenses
6 in servicing clients and those should be reimbursed.

7 I said, "If you want to be reimbursed for actual
8 expenses I would have to audit the books. Is that what you
9 are asking?" and they said "No." They said, "In lieu of
10 we want to get an agreement now of an expense reimbursement
11 schedule which would be a function of revenues rather than
12 actuals."

13 MR. HELLERSTEIN: No further questions.

14 REDIRECT EXAMINATION

15 BY MR. SIMON:

16 Q When you talked to Hanno Mott and Bill Hermann
17 on the issue of the expense schedule, did they tell you that
18 their expenses would be of a financial nature as opposed to
19 an administrative nature?

20 A No, they just said expenses. They said "After
21 all, you know, we will have expenses."

22 Q And you did know they would have expenses, did
23 you not?

24 A I knew them to be whittling me down relative to
25 an agreement I had arrived at.

jqd

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THE COURT: I take judicial notice of the fact that any sane businessman -- and I will assume for the purposes of this discussion that Mr. Stern was and is sane-- knows that expenses are incurred in the course of a business venture. Yes?

THE WITNESS: That is right.

Q The answer is yes?

A Yes.

Q And there was no discussion at all as to what kinds of expenses, whether they be financial expenses or administrative, that is correct, is it not?

A That is correct.

Q And you didn't care so long as the figure of 100,000, which was substituted, was applied in accordance with what your agreement was?

MR. HELLERSTEIN: Objection. The question is argumentative.

THE COURT: We don't need to have him say it if he testified to that.

MR. SIMON: It's my understanding of his testimony that he said he didn't care.

THE COURT: That is my understanding too.

Q Where, if ever, did you discuss with anyone from Satra any distinction between financial expenses and

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administrative expenses?

THE COURT: Did you ever have such a discussion?

THE WITNESS: I discussed with Mr. Oztemel the difference between the expenses associated with financing and barbers as distinct from current income.

Q When did you have that discussion?

A At 7:00 p.m. of August 15 at his office.

Q Dr. Stern --

THE COURT: Before he wrote the material on this Schedule C of Exhibit C-D?

THE WITNESS: That is right.

Q Did you discuss it within the context of that schedule as if it had been set forth by Hanno Mott? Was it a general discussion or did it apply to the schedule?

A It says here --

Q That is not my question.

A Yes, we had such a discussion.

Q And it applied to the schedule?

A Yes.

Q Dr. Stern, I submit to you that you previously testified that you absolutely had no discussions with Mr. Oztemel about that schedule in that evening meeting, is that not a fact?

MR. HELLERSTEIN: This may be the style of

jqd

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questioning at Ft. Worth, but Mr. Simon is not here to testify.

MR. HILL: I object to that. Mr. Simon is a guest in this court and Mr. Hellerstein knows better than to make such a comment.

MR. SIMON: My feelings are not hurt.

THE COURT: It's not a question of Mr. Simon testifying. He has a right to ask his questions. Whether I term Mr. Stern hostile -- well, can you refer to what you are referring to?

MR. SIMON: Page 282 of the transcript.

THE COURT: Let's look at it and if there is an inconsistency we can bring it out.

MR. SIMON: 282 or 382.

MR. HILL: This was in the testimony read to the jury, your Honor, I believe.

THE COURT: Is this pretty near the end of your questioning?

MR. SIMON: It is the end.

THE COURT: I will take five minutes in the robing room and you can call me when you are ready.

(Recess.)

MR. SIMON: If the Court please, Mr. Hellerstein tells me that we are not arguing about impeachment and we

jqd

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will clear up this point and we will be through.

Q Dr. Stern, the testimony that I was concerned with is the testimony which you gave at page 332 of the transcript and it refers -- and you have had a chance to look at it -- to this expense schedule.

Your words were, and I will read it quickly, beginning at the bottom of 331, line 21, which was your question. We have been over this before.

The Court asked this question:

"Q In addition to that, as Mr. Hill I thought had just brought out, you and Mr. Mott and maybe some others also discussed the question of expense reimbursement on August 21 and, in particular, the schedule that was attached," and your answer at that time, Dr. Stern, was, "We discussed it in the morning of the 31st applicable to the earlier agreement. It happens that added it to the 31st agreement. There was no discussion at that time of them having added it to the 31st agreement."

THE WITNESS: That is right.

Q And that is correct?

A Absolutely.

MR. SIMON: Nothing further.

(Continued on page 154.)

jqd

Stern-recross

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RE CROSS EXAMINATION

BY MR. HELLERSTEIN:

Q When Mr. Simon was asking you questions about the payments that were made under the December 1973 agreement he asked you a question whether the expense reimbursement schedule was applicable to the monthly sums of \$16,667 and he asked you a question of whether the expense reimbursement schedule was applicable to the monthly advances of \$9,350.

At that time he wanted to offer you a reason why it was not applicable and Mr. Simon asked you the questions.

I now ask you the question.

A I will offer the reason as it relates to a discussion I had with Mr. Schloss.

MR. SIMON: Same objection, and I assume the same rulings. He is going to talk about a way of reasoning.

THE WITNESS: I am going to talk --

THE COURT: I will allow him to explain the basis of his answer. It involves a discussion.

THE WITNESS: It involves a specific discussion. It has to do with the discount, the present value of future moneys. I did discuss this with Mr. Schloss and I am sure it's in the transcript.

THE COURT: You are not saying that you discussed any items relating to the 1973 agreement.

1 jqd

Stern-recross

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2 THE WITNESS: No, sir, but I discussed the mean-
3 ing of the current versus the future earnings, of the fact
4 that you don't add them up or you don't compare them on a
5 one-to-one ratio. The reasoning is as simple --

6 Q Say what you said to Mr. Schloss and say what
7 Mr. Schloss said to you, and if you can fix the time.

8 A Absolutely.

9 It was before I went to lunch for what I thought
10 was to be a critical negotiation with Mr. Stafford on
11 September 8.

12 I asked Mr. Oztemel if he had any guidance for
13 my negotiations. His response was no, he thought I would be
14 in the best position to judge. I then thought that
15 Mr. Oztemel is a rather proud man and may not be willing --

16 Q Say what you said to Mr. Schloss.

17 A I then went to Mr. Schloss and I explained to
18 him that I was going to negotiate with two elements, one as
19 a retainer and one a commission. I would like some guidance
20 where I should put the maximum effort.

21 I then went on to tell him the following: one
22 can do a simple theoretical calculation on the discounted
23 present value of future moneys. So that you are able to
24 relate current as compared to future income. For instance,
25 the banks now, let us say, give you ten percent interest.

1 jqd

Stern-recross

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2 MR. SIMON: It's late in the day, but if this
3 has any relevance to anything, I don't know where.

4 THE COURT: I must say, I don't find it very
5 helpful.

6 MR. HELLERSTEIN: Nothing further.

7 THE COURT: Thank you, Mr. Stern.

8 (Witness excused.)

9 THE COURT: Am I to understand there is another
10 witness?

11 MR. HILL: Yes, your Honor, I want to put
12 Mr. Oztemel on.

cvx 13 A R A O Z T E M E L, called as a witness on behalf of the
14 defendants, having previously been sworn, resumed and
15 testified further as follows:

16 DIRECT EXAMINATION

17 BY MR. HILL:

18 Q Subsequent to 1971, Mr. Oztemel, you advised
19 Mr. Stern with respect to your arrangements and obligations
20 with him. Did you ever have a discussion with Dr. Stern
21 about the prospect of entering into a new agreement with
22 IBM?

23 A Yes.

24 Q Do you recall when that conversation was more
25 or less?

1 jqd

Oztemel-direct

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2 A The specific date, no, I do not recall.

3 Q Was it before the 1973 agreement was executed?

4 A It was some time during, I believe, the latter
5 part of 1972.6 Q Could you tell us what that discussion was, what
7 you said to him and what he said to you?8 A Well, the discussion was arranged by, I think,
9 the respective attorneys at the offices of Dr. Stern's
10 attorneys. We met alone and the discussion generally was
11 to see if we could find a means of settlement. I told
12 Dr. Stern that --13 MR. HELLERSTEIN: It seems to me the discussions
14 and settlement are privileged.

15 THE COURT: They normally are, yes.

16 MR. HILL: Not between the parties in the absence
17 of counsel. Moreover, there has been a charge here at least
18 two or three occasions this morning, I believe, that we
19 entered into this new agreement without discussing it with
20 Dr. Stern and somehow we were doing bad things to Dr. Stern
21 when we entered into this agreement.22 I will elicit testimony from this witness that he
23 did discuss it with Dr. Stern. He discussed the reasons for
24 it, and moreover, I should also point out, for the record,
25 that there were several full-blown proceedings before this

jqd

Oztemel-direct

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Court on the question of the new agreement and what was supposed to be done and what wasn't supposed to be done.

THE COURT: There is a difference between two possible positions. One is that the negotiations occurred without Dr. Stern knowing anything about the fact that they were occurring.

The other is that he took no part in them.

Mr. Hellerstein, I would like to ask you whether you are trying to put before the Court the fact that Dr. Stern simply didn't know that any proceedings were going on or, rather, that he didn't take any part in them.

If it's the latter, then this testimony isn't necessary.

MR. HELLERSTEIN: I will let Mr. Fisher answer that.

MR. FISHER: Several months prior to the actual transaction, the new agreement --

THE COURT: In December 1973?

MR. FISHER: I think Mr. Paterson advised us that it was then under negotiation, but we were not any party to the negotiations.

THE WITNESS: That is not what I was referring to. The conversation took place between myself and Dr. Stern and I specifically advised Dr. Stern of a new agreement. I asked

jqd

Oztemel-direct

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his opinion. I told him what our problems were and we then--
then I tried to find a solution with him.

Dr. Stern knew very well what the underlying
reasons were and what we were about to do.

THE COURT: I am not sure this is relevant
here because I have indicated that my instinctive reaction
is that the question of good faith or bad faith is really not
at issue. The question is whether there was a renewal of the
contract and, if so, he is entitled to certain benefits.
If not, he is not entitled to certain benefits.

I don't blame Mr. Oztemel or Mr. Hill for wishing
to remove any implication of deceptive behavior. For that
purpose I am glad to have heard what you have to say.

MR. HILL: That is the only reason it's offered.

THE COURT: All right.

Q Mr. Oztemel, you heard Mr. Stern testify here
with respect to a meeting which he had with you at 7:00
o'clock in the evening on August 31 when the now famous
Plaintiff's Exhibit C was signed by you.

Did you have any discussion with Dr. Stern about
the types of expenses that were covered by the exhibit to
Plaintiffs' Exhibit C, the August 31 document?

A We had quite a deal -- we had many conversations--

THE COURT: This evening.

1 jqd

2 Q What about in the evening of the 31st?

3 A I mean precisely that, Mr. Hill. There was just
4 long conversations, first with me, then this agreement.
5 Mr. Schloss would try to convince him and then with
6 Mr. Mott and whoever else was there, we were trying to con-
7 vince Dr. Stern that there are such things as expenses and,
8 with all due respects, there are some people who do not
9 understand or accept that business operates with expenses.

10 Q Did you discuss the kinds of expenses involved
11 i this transaction?

12 A We did not discuss categories of expenses but
13 we specifically did discuss -- I personally specifically
14 discussed with Dr. Stern the magnitude of expenses as they
15 were outlined to us by IBM because IBM had already warned us
16 that we must expect substantial expenses because of the
17 number of people expected to work with us in Moscow. So we
18 certainly discussed those. But we did not categorize as to
19 where they fell.

20 Q Did you discuss amounts? Was reference made to
21 amounts?

22 A We tried to arrive at amounts and I think we
23 clearly arrived, with Dr. Stern's final agreement after many
24 hours, that \$100,000 minimum, even though no sales were made,
25 would not be an unreasonable amount of money we were expecting

jqd

Oztemel-direct

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to spend. We are not entirely happy because I think we are looking for more, but we settled on that.

Q Let me take you now to the now unfortunately erased schedule that was up here.

Did that schedule, as put on the blackboard and as copied into a document which is now an exhibit, your Honor, which I believe is quadruple E --

THE COURT: I never found out what the exhibits are in between, but there must be others.

Q I think I will put these in front of you and his Honor can sort of look over his shoulder.

Mr. Oztemel, does that chart reflect your understanding as of August 31 with respect to how the expense schedule was supposed to work?

A Clearly not.

Q Would you explain why it doesn't?

A Because whether erroneously or purposely, I don't know. But my understanding, and it was Dr. Stern's understanding then, that at zero income, even our expense deduction would have been \$100,000. That 100,000 belongs here and the 200 belongs there and the curve indeed goes in that fashion.

Q So I am clear on this, it was your understanding that in August of 1971, in any event, there was going to be 100,000 and the schedule in terms of offsets against income

1 jqd Oztemel-direct/cross

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2 just didn't apply until you got to \$100,000?

3 A That is correct. We had clearly understood, all
4 of us after many hours, that if there were no income, and
5 we expected that there would not be income from IBM perhaps
6 for some time, that our minimum expenses nevertheless would
7 be \$100,000 comprised of travel expenses, interpreters,
8 etc., etc.

9 Q So that at the risk of repetition, the curve
10 that appears on that chart really should start not at zero
11 but at \$100,000?

12 A That is correct.

13 MR. HILL: No further questions.

14 CROSS-EXAMINATION

15 BY MR. HELLERSTEIN:

16 Q Mr. Oztemel, do you recall testifying at page 638
17 of the transcript in answer to Mr. Hill's questions as
18 follows:

19 "Q And how did you tie it -- that is, the
20 schedule of expenses -- to the schedule?

21 "A By starting from point zero, which was
22 100,000, point zero income, 100,000 and then going from there.
23 But at some point we agreed that at some point the profits
24 then would not justify further extension of expenses."

25 Do you recall so testifying?

1 jqd

Oztemel-cross

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2 A They are identical as far as I understand what
3 I said, and as far as I think what I said now. They are
4 identical. In other words, that 100,000 starts from zero
5 level where the zero is.

6 Q The question is whether you recall giving such
7 testimony?

8 A I don't, but I am sure it's so.

9 Q If we would have a column, income, and another
10 column of expenses, you would relate the columns as follows--

11 MR. SIMON: We rise again to point out on the
12 record that this is the same type of examination the Court
13 has held may or may not be material. I am perfectly willing
14 to concede it may be material on both sides to the Court but
15 I want to protect the record.

16 THE COURT: Whatever ruling I make will be
17 uniform as to both witnesses and no matter who answers the
18 question.

19 MR. HELLERSTEIN: I am also testing credibility,
20 your Honor.

21 Q Is that correct, zero income, \$100,000 of expenses?

22 A If I were doing it I would say zero to \$25,000,
23 \$100,000 expenses. I would not do it in that way. You have
24 to start interpolating which is precisely not the under-
25 standing.

jqd

Oztemel-cross

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MR. HILL: If I may make a suggestion that Dr. Stern put his chart on. Maybe the thing to do is to let Mr. Oztemel put his chart up.

THE COURT: I am perfectly willing to do that. I find it difficult in understanding what his theory is. Whether it's right or wrong, I know it's different from Dr. Stern's. It's an understandable point of view.

Up to \$25,000 worth of income you were entitled to deduct \$100,000 worth of expenses?

THE WITNESS: That is right. From there until we reached 250,000 we were not entitled to deduct anything else. From then on we started again, according to that schedule.

Q Let's suppose you have \$260,000 of income, how much expenses could be applied?

A I don't know. If you drew this graph or this thing to scale, I think we would have no problem in finding exactly what it would be.

Q Maybe you can look at page 3 of Exhibit D.

A Yes.

Q How much expenses would be applied against \$260,000 of income?

THE COURT: You really mean against the extra 260,000 against the 250,000?

1 A My understanding would be, and was still then,
2
3 that for the next \$250,000 we were allowed \$50,000 extra.

4 You said what?

5 Q You have \$260,000 of income.

6 A You have \$10,000 more. 10,000 is about .4 or 5.
7 I think that would be about \$2,000, I believe.

8 Q \$102,000 as expenses?

9 A That is right.

10 Q You have taken what percent against the 10,000?

11 A I believe either .4 or 4 percent, whatever.

12 Q But you wouldn't take a percentage against the
13 first \$250,000?

14 THE COURT: Four percent of \$10,000 would be
15 \$400, not \$2,000.

16 THE WITNESS: You are right.

17 Q It's 20 percent, isn't it?

18 A 10,000 by 250,000.

19 THE COURT: Are you saying, so I get your theory,
20 that you would apply the same ratio as there is in the
21 second column here or second line of the two columns, that is
22 the ratio?

23 THE WITNESS: That is right.

24 Q That is a ratio of 20 percent?

25 A Yes.

1 jgd

Oztemel-cross

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2 Q In other words, \$102,000?

3 THE COURT: Right.

4 Q I notice that for the progression or for the
5 increment between \$250,000 and \$500,000 of revenue you apply
6 a percentage, a constant percentage of 20 percent against
7 each dollar of revenue, is that correct?

8 A I don't follow you.

9 Q I will put the question again.

10 Starting with revenue of \$251,000 in the year
11 and continuing until revenue of \$500,000 in a year, is it
12 your testimony that from each dollar of revenue 20 percent is
13 to be deducted for expenses?

14 A If arithmetically that is how they add up, that
15 is my understanding.

16 Q But for the first \$250,000 is it your testimony
17 that \$100,000 applies for each dollar of expense?

18 A No. It's just that the 100,000 was understood
19 to be the minimum expenses at zero level, but did not increase
20 until we passed \$250,000.

21 THE COURT: Let me ask you, suppose in the first
22 year there had been revenue of \$50,000. Is it your position
23 that the agreement was that you are entitled to full
24 \$100,000 credit against that \$250,000?

25 THE WITNESS: That is right.

1 jqd

Oztemel-cross

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2 THE COURT: What Mr. Hellerstein is trying to
3 bring out is that you have applied the full amount in the
4 first 250,000 but when you came to discussing the second
5 area of another \$250,000, you pro-rated the equivalent
6 incremental.

7 THE WITNESS: Precisely.

8 THE COURT: Why not pro-rate in the first
9 instance?

10 THE WITNESS: We had come to an understanding
11 that even if there were no revenues we would have a minimal
12 of \$100,000 in expenses?

13 THE COURT: That applied only to the first 100,
14 is that right?

15 THE WITNESS: It's the first 250.

16 THE COURT: Of expenses?

17 THE WITNESS: Of income.

18 THE COURT: All right, or to the first 100,000.

19 THE WITNESS: Yes.

20 THE COURT: All right.

21 Q When you made this agreement with Dr. Stern,
22 Mr. Oztemel, you had no agreement with IBM in hand, is that
23 correct?

24 A That is correct.

25 Q It was entirely possible, was it not, that an

jqd

Oztemel-cross

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1 agreement with IBM could have called for income of \$100,000
2 a year for 20 years?

3
4 A I think if I remember correctly, Mr. Hellerstein,
5 it was not the thinking of anybody at that time that that
6 could happen, those of us that thought very astronomical
7 figures. There were those like Schloss who were pessimistic.
8 Nobody assumed there would be an even number like \$100,000.

9 Q If it happened that you got the contract for
10 IBM calling for payments by IBM to Satra of \$100,000 a year
11 spreading over 20 years, under your understanding of this
12 agreement, as you testified, Dr. Stern would have got
13 nothing, is that correct?

14 A Certainly that wasn't the intent. Precisely
15 that is why, as Dr. Stern told you himself, I asked him what
16 best to judge what to negotiate with IBM so he was not in
17 that position. Also that was the reason I agreed to give
18 Dr. Stern the benefit of 50 percent of retainers.

19 Q So if the \$100,000 was to be paid each year for
20 20 years as a retainer, Dr. Stern would have gotten exactly
21 half, \$50,000 without deduction, under your understanding?

22 A If the transaction would have been -- and
23 certainly it would not have been accepted as a contract by
24 us in those exact terms -- under the hypothetical example,
25 yes, but that would not be acceptable to us or Dr. Stern.

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2 Q One last question.

3 Would you point out for the Court where in
4 Exhibit C there is any language to support your understanding
5 that the first \$250,000 of incremental annual revenue would
6 be subject to \$100,000 of expense and the second \$250,000
7 of incremental annual revenue would be subject only to a
8 pro-rata expense?

9 A Specifically, Mr. Hellerstein, in the schedule--
10 whatever that is, the schedule attached to the thing, as
11 you note purposely we didn't go zero to 250 and then 250 to
12 300 and 300 to 325. We just put the numbers because the
13 understanding I thought was clear with Dr. Stern.

14 Q I take it you read this carefully when it was
15 put before you, you initialled it, you so testified?

16 A Carefully. There was not much about it.

17 Q Sufficiently careful to initial each page,
18 Mr. Oztemel?

19 THE COURT: I will state that neither of the
20 parties read the documents sufficiently carefully.

21 Q The question I put to you, Mr. Oztemel, is if
22 you can point out to the Court any language in this document
23 that supports --

24 THE COURT: I don't think there is any guessing
25 game. If you are talking about this page it clearly does not

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talk in terms of pro-rata and I don't think Mr. Oztemel says so.

THE WITNESS: No, I don't.

(Plaintiff's Exhibit HHHH was marked for identification.)

Q I show you quadruple H for identification, Mr. Oztemel, and ask if you sent that letter on or about June 26, 1973 to IBM World Trade Corporation?

A Yes, I remember the letter without having read the whole thing. Yes, I do.

MR. HELLERSTEIN: I offer it in evidence.

MR. HILL: No objection.

THE COURT: Received.

(Plaintiff's Exhibit HHHH was received in evidence.)

MR. HELLERSTEIN: I draw your Honor's attention to the first sentence where Mr. Oztemel states, "We refer to your proposed contract dated May 31, 1973 to replace the existing contract between our firms."

THE COURT: I understand why you draw that to my attention. I assume Mr. Hill's comments there is that the words "renew" and "replace" are not necessarily equal in the law.

MR. HILL: I think that is clear enough.

1 THE COURT: I wish it were clear.

2 Mr. Oztemel, you are excused.

3 Are you concluded?

4 MR. HILL: Yes.

5 (Witness excused.)

6 THE COURT: Where do we go from here?

7 MR. HILL: I am somewhat disturbed by a comment
8 your Honor made during the course of today's proceeding that
9 what had been presented to your Honor was not really what
10 your Honor had expected to have presented. As far as we are
11 concerned, we are satisfied that we presented what needed to
12 be presented.
13

14 THE COURT: You have been working at the case
15 for the last week and I haven't. Let me answer you, since
16 you said that.

17 First of all, we did get later material which is
18 what I did expect to hear something about. Secondly, it may
19 be that a good deal of this is much more mathematically
20 demonstrable on paper than I had assumed. But normally when
21 you hold a trial for damages there is a certain amount of
22 testimony about damage and there wasn't really any today and
23 I guess that is because this is a mathematical computation,
24 either according to formula A or B or not at all.

25 MR. HILL: This is what we thought we had in the

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2 exhibits.

3 THE COURT: I believe they are. It hadn't
4 occurred to me so much.

5 I still want to ask the question how we are
6 going to wrap this up. I think I must call on your gentlemen,
7 and you probably thought I would, to submit findings of fact
8 and conclusions of law on the material before me at this
9 time. I am wondering how we should do this.

10 I suppose each of you ought to submit, insofar
11 as we are talking about actual money computations, a
12 computation as to how much would be owed Dr. Stern in the
13 event that the 1973 contract does not constitute a renewal
14 and how much he is owed in the event that it is a renewal.

15 In addition, you have raised the further question,
16 which I guess is a matter of law and not a fact, but has to
17 be dealt with somehow or another, as to whether even if the
18 1973 contract is a renewal, this contingent liability clause
19 affects Dr. Stern and, if so, how?

20 Am I not correct that you raised that question?

21 MR. HILL: Sure, your Honor. We also raised the
22 question, since he now testified that he wasn't responsible
23 for any expenses at all, we also raised the question, and
24 it's clearly in the case, as to whether or not the expense
25 schedule, if you like, applies to the \$16,000 monthly payment

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2 as well as this advance.

3 THE COURT: That will be part of your computation.

4 MR. HILL: Sure.

5 THE COURT: What do you propose about what
6 papers are to be submitted from here on and what timing?7 MR. HILL: Speaking for the defendants, your
8 Honor, I suppose that one of the things we need to do is
9 examine this memo that was submitted this morning which I
10 just haven't had a chance to do. I would suppose that we
11 would submit proposed findings and conclusions of law on the
12 subject of damages. I would suppose also that as to this
13 question of renewal we would file some sort of a memorandum
14 of law.

15 THE COURT: All right.

16 MR. HILL: I would suppose that on the question
17 of the scope or the import of the jury verdict we will want
18 to address ourselves to that and I guess that would be in
19 part responsive as to the position taken by the plaintiff as
20 to what they decided. Your Honor has expressed some --

21 THE COURT: Reactions.

22 MR. HILL: Some concern as to what they did
23 decide, as to whether what is in this case and what is out
24 of it in this proceeding.

25 THE COURT: I really don't think, despite the

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fact that we split this in two pieces, that we are faced with anything other than we would be if we were at the end of a regular non-jury trial with the exception that it happens that the plaintiff has submitted a document which covers some of the material we are talking about but which may not cover it all. I doubt it does.

It doesn't include proposed findings, for example.

MR. HELLERSTEIN: No.

THE COURT: So I would ask Mr. Hellerstein to submit a memorandum on any points he hasn't covered in this and you submit a memorandum on all the points that are to be covered, and each of you also to submit proposed findings of fact and conclusions of law. I do not want to put you onto any more work than is necessary, so I would hope if those were submitted --

MR. HELLERSTEIN: Before your Honor sets a date, I wonder if I can make one more point. The Satra Corporation subsidiary's financial statement as of July 31, 1973 came to my attention yesterday. It does not show a healthy financial situation. It shows, in fact, a deficit and I am very much concerned --

THE COURT: In net worth, you mean?

MR. HELLERSTEIN: Yes, your Honor. I am very much concerned that any judgment we are possibly eligible to

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2 obtain might be in jeopardy. I would, therefore, ask for
3 whatever consideration that your Honor could give us in terms
4 of early dates.

5 MR. HILL: I must say, wholly apart from the
6 impropriety of this argument, I haven't had a chance to look
7 at this statement but I suppose I can point out that they
8 have unrestricted cash of \$7,000,000, accounts receivable of
9 seven and a half million, and inventory of two million four.
10 I don't really know what the bearing of what appears to me
11 to be a deficit of \$1,000,000 has. I really don't.

12 THE COURT: I can't comment on anything as
13 elaborate as this statement from the bench, it having been
14 thrown at me right now. I won't try to. I will say that
15 Mr. Hellerstein is entitled to move for any protection he
16 feels. If he feels it's appropriate, that is. Until that
17 time I am not really going to speed things up.

18 I don't think we ought to let this matter slide,
19 in any event. I was going to suggest that these papers, it
20 seems to me, could be submitted within two weeks and if
21 Mr. Hellerstein concludes before the end of the two weeks
22 that something extraordinary is required, I would give it
23 earlier attention and decision than I would otherwise.

24 Otherwise, I will give it its appropriate place.
25 Is there any problem involved in that schedule?

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MR. HILL: Yes, I guess I do. I say this for several reasons. I have to go abroad on matters of a client, your Honor. Two, they are the plaintiffs, and it seems to me that this business of exchanging findings at the end of a two-week period, I hate to use the word because it's overused, but it's counterproductive.

They put in a set of findings and we sit down and put in a set of findings at the same time. They are really not going to be at issue.

THE COURT: That is the question I wanted to ask. I was going to ask this. I do think it's appropriate for the plaintiffs to submit their findings first except on the question of mitigation, of course.

MR. HILL: I understand.

THE COURT: Then I think that the findings to be submitted by the defendants thereafter should indicate those findings of the plaintiff that they agree with and simply propose any other findings they don't agree with.

MR. HILL: The same thing is true with the memorandum of law except for mitigation. We can say that it's responsive. It's not sort of semi-parallel.

THE COURT: Let's do it this way: because you have the burden on mitigation, if two weeks is too hard subject to Mr. Hellerstein's right to move this case, let's

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1 talk in terms of three weeks for the following: Mr. Hill,
2 or the defendants, will submit to plaintiff proposed findings
3 of fact and conclusions of law on the question of mitigation
4 and the plaintiffs will submit to the defendants proposed
5 findings of fact and conclusions of law on other issues,
6 and within ten days thereafter, counterfindings are to be
7 submitted on each other.
8

9 That leaves the question of memoranda up in the
10 air, but I really don't see why we have to -- well, submit
11 memoranda on the same points at the same time.

12 MR. HILL: I was going to say if they have
13 memoranda to submit in support of conclusions of law we
14 ought to get those memoranda at the same time.

15 MR. HELLERSTEIN: Our memoranda we put in today
16 would satisfy what you want to do.

17 THE COURT: If it's sufficient in your mind,
18 that is all right with me. I just want to tell you that you
19 are free to add anything you want to.

20 Thank you, gentlemen. In spite of the somewhat
21 confusion it's been very interesting and I hope I can unsnarl
22 it fairly.

23 * * * * *

